



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

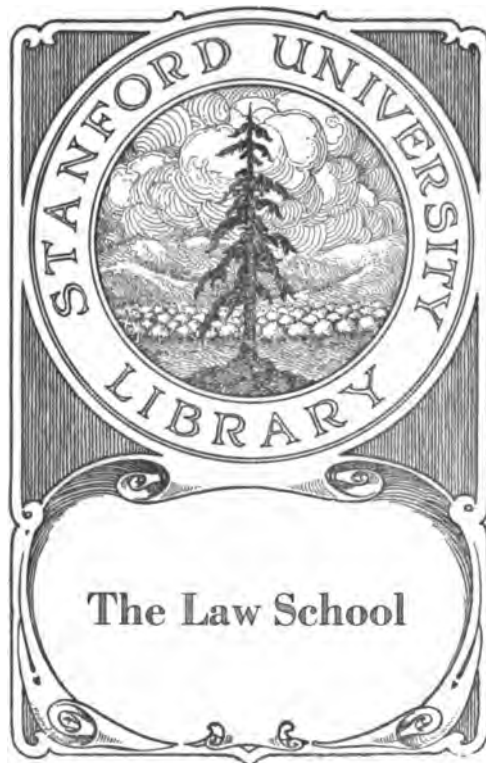
We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>





JEP
JQA
ET
v. 6

THE
Queensland Law Journal
REPORTS.

CASES DECIDED 3058

From 24th October, 1893, to 16th March, 1896.

EDITED BY A. DOUGLAS GRAHAM, B.A., SOLICITOR, ASSOCIATE TO
HIS HONOUR THE CHIEF JUSTICE OF QUEENSLAND.

SHORTHAND REPORTER, R. S. TAYLOR.

STANFORD LIBRARY

VOLUME VI.

BRISBANE:
EDWARD POWELL, ELIZABETH STREET.

1896.

L28130

MAR 14 1947

Y8A80L 0907405

TABLE OF THE CASES REPORTED.

	PAGE		PAGE
ARCHER, <i>In the Lands and Goods of</i> ...	27	GREAT MONKLAND TRIBUTE CO., LTD. v.	
ARIDA v. SID ...	6	TRUEMAN ..	112
ATKINSON, <i>Re the Will of</i> ...	28	HALL, A LIQUIDATING DEBTOR, <i>Re</i> ...	179
BANK OF AUSTRALASIA v. HENRIETTA LEVY ...	208	HALL v. LEYSHON, <i>Ex parte</i> HALL ...	282
BLACK v. TURNER ...	158	HARDING, <i>Re the Will of</i> ...	225
BLOCKSIDGE, <i>In re</i> ...	148	HOLLAND v. HARTFORD ...	86
BOWLER, <i>Re, Ex parte</i> CALDWELL ...	212	IRVING v. GAGLIARDI ...	155
BRABANT & CO. v. KING ...	119	IRVING v. GAGLIARDI, <i>Ex parte</i> GAGLIARDI	200
BRITISH AND AUSTRALASIAN TRUST AND LOAN		JESSOP, <i>Re the Will of</i> ...	286
COY., LTD. v. SOUTH QUEENSLAND PAS-		JONES, <i>Re the Will of</i> ...	261
TORAL COY., LTD. ...	88	JONES, A LIQUIDATING DEBTOR, <i>Re</i> ...	805
BROOMFIELD, <i>Re</i> ...	176	KEENAN, <i>Re the Lands and Goods of</i> ...	260
BROWNE v. COWLEY ...	284, 254	KELLY v. KELLY ...	72
CAMERON, <i>Re the Goods of</i> ...	214	KEOGH v. BLAKE ...	218
CASTLEMAINE BREWERY AND QUINLAN, GRAY		KLATTE, <i>Re</i> ...	275
AND CO., BRISBANE, LTD., v. COLLINGS,		LASCELLES v. M'SWAINE ...	44
<i>Ex parte</i> COLLINGS ...	278	LEE GOW v. WILLIAMS, <i>Ex parte</i> WILLIAMS	282
CASTLES v. ROESSLER ..	812	LILLEY, A SOLICITOR, <i>Re</i> ...	87
CLARK & FAUSET v. MUNICIPALITY OF BRISBANE		MACKENZIE, AN INSOLVENT, <i>Re</i> ...	250
AND ANOTHER ...	181	MACNAMARA, <i>Re the Will of</i> ...	219
COULSON, AN INSOLVENT, <i>Re</i> ...	8	MAGILL v. BANK OF NORTH QUEENSLAND	262
DAVENPORT, <i>Re the Will of</i> ...	285	MALONE v. WRIGHT, HEATON & CO. ...	270
DAVIES v. WILLIAMS ...	278	MARTIN, A LIQUIDATING DEBTOR, <i>Re</i> ...	808
DUNSTAN, <i>Re</i> ...	182	MATTHEWS, <i>Re the Will and Codicil of</i> ...	278
DWYER, <i>Re</i> ...	227	M'COLLIM, <i>Re the Trusts of</i> ...	260
EATON, <i>Re the Will of</i> ...	287	M'KENNA, AN ARTICLED CLERK, <i>Re</i> ...	288
FERRETT, <i>Re the Trusts of the Will of</i> ...	183	M'MAHON v. DEUSNAP ...	199
FORBES, <i>Re the Goods of</i> ...	29	M'MAHON v. PATERSON ...	197
FRIEMUND v. SPANN ...	185	M'MAHON v. PERRY ..	196
GAYLARD, <i>Re, Ex parte</i> PATERSON & CO. ...	808	MOXHAM, <i>Re the Will of</i> ...	804
GILBERT v. BOURNE ...	270	MULHOLLAND v. KING ...	208
GLADSTONE (MUNICIPALITY OF) v. O'NEILL ...	206	MURISON v. RANKIN ...	52
GOLDSBOROUGH, MORT & CO., LTD. v. DOYLE	1	NARRACOTT, <i>Re the Will of</i> ...	154
GOODRICH, <i>In re</i> , ELLIOTT BROS. v. CAMPBELL	294	NEWMAN-WILSON, A PERSON OF UNSOUND	
GOULD v. M'NAIRN, <i>Ex parte</i> M'NAIRN ...	171	MIND, <i>Re</i> ..	229, 814
GRACE, AN INSOLVENT, <i>Re</i> ...	286, 294		

	PAGE		PAGE
NEWMAN-WILSON, A PERSON OF UNSOUND MIND, <i>Re</i> , MACALISTER <i>v.</i> NEWMAN-WILSON ...	215	R. <i>v.</i> MORRIS	9
NO. 1 NORTH PHOENIX GOLD MINING CO., LTD. <i>v.</i> PHOENIX GOLD MINING CO., LTD. ...	307	R. <i>v.</i> NORTH BRISBANE (LICENSING JUSTICES OF)	95
NORTH QUEENSLAND MORTGAGE & INVESTMENT CO., LTD. <i>v.</i> M'DONALD	181	R. <i>v.</i> ROBINSON	184
O'BRIEN <i>v.</i> O'BRIEN	41	R. <i>v.</i> ROSS	261
PARKER <i>v.</i> PARKER AND AH SAM	145	R. <i>v.</i> ROYLE	146
PHILLIPS <i>v.</i> DOWZER	210	R. <i>v.</i> TOOMBUL (ELECTORAL JUSTICES OF) ...	88
PLANT <i>v.</i> ROLLSTON	98	R. <i>v.</i> TRACEY	272
POWELL, <i>Re</i>	36	R. <i>v.</i> VOS	215
POWERS, <i>Re</i>	70	R. <i>v.</i> WHELAN	165
POYSER <i>v.</i> MOUNT SHAMROCK GOLD MINING CO., LTD., AND ANOTHER ..	276	R. <i>v.</i> WHITEHOUSE	313
PUNOWNERS' ASSOCIATION, LTD., THE, <i>Re</i> ...	30	R. <i>v.</i> YALDWYN	76
QUEENSLAND BREWERY LTD. <i>v.</i> CAMPBELL ...	286	SANDGATE (MUNICIPALITY OF) <i>v.</i> M'LEOD ...	66
QUEENSLAND INVESTMENT & LAND MORTGAGE CO. <i>v.</i> HART AND OTHERS	180, 186	SCOTT, A LIQUIDATING DEBTOR, <i>Re</i> ..	119
RAVEN <i>v.</i> BURNETT	166	ALFRED SHAW & CO., LTD., <i>Re the Trusts of</i>	55
RAVEN <i>v.</i> CLEVELAND DIVISIONAL BOARD ...	67	ALFRED SHAW, <i>Re, Ex parte</i> HUGHES ...	300
ROCKHAMPTON (MUNICIPALITY OF) <i>v.</i> INGHAM ..	256	SHIELDS & BECKETT, <i>Re, Ex parte</i> R. T. SHIELDS	115
R. <i>v.</i> BUNNEY	80	SKINNER, <i>Re</i>	68
R. <i>v.</i> CHANCELLOR AND OTHERS	76	SOUTH AUSTRALIAN LAND & MORTGAGE CO. <i>v.</i> M'INNES	289
R. <i>v.</i> CASTLES AND OTHERS	94	STANLEY <i>v.</i> WISEMAN	84
R. <i>v.</i> CONNELL	209	STEPHENSEN, AN INSOLVENT, <i>Re</i>	32
R. <i>v.</i> TIM CROWN	288	UNION BANK OF AUSTRALIA, LTD. <i>v.</i> RAINE ..	58
R. <i>v.</i> FREEMAN	281	VICTORIA INSURANCE CO. <i>v.</i> KING	202
R. <i>v.</i> FUZIL DEEN	302	VICTORSEN <i>v.</i> ITHACA SHIRE COUNCIL ...	31
R. <i>v.</i> HOUSTON	145	WALKER, <i>Re the Will of</i>	259
R. <i>v.</i> JACK	60	WATSON, AN INSOLVENT, <i>Re</i>	259
R. <i>v.</i> KOVALKY	219	WATSON, A LIQUIDATING DEBTOR	208
R. <i>v.</i> MANGIN ..	68	WEBB, <i>Re</i>	305
R. <i>v.</i> MANY MANY	224	WESTERN QUEENSLAND PASTORAL CO., LTD., THE, <i>Re the case of</i>	234
R. <i>v.</i> MCGEE	151	WHITE <i>v.</i> RUSSELL	206
		WILSON <i>v.</i> HARVEY & SONS	57
		WOODS <i>v.</i> SHERIFF OF QUEENSLAND ...	163, 175
		YOUNG <i>v.</i> SMYTH	73

INDEX TO VOL. VI.

	PAGE		PAGE
ABSOLUTE DEED OF GIFT—		The court has no jurisdiction to order costs of litigious proceedings on an application to pass executors' accounts to be paid out of an estate, which is not in course of administration in the court, although the court may allow executors to retain out of the funds in their hands any expenses properly incurred by them in the execution of their office.	
See BILLS OF SALE ACT OF 1891	182	Re MACNAMARA'S WILL	219
ACCIDENT—		Passing accounts. Executors' commission. Gross and net receipts. Commission will be allowed to an executor properly carrying on a business on the net, and not on the gross amount of his receipts from the business.	
See NEGLIGENCE	119	Re WALKER'S WILL	259
ACCOUNTS—		ACTUAL PRACTICE—	
Passing accounts. Breach of trust. Duty of Registrar. The Registrar's duty on passing executors' accounts does not include consideration of the question whether an amount admitted by the executor to have been received, was received in consequence of a breach of trust. But he may report the facts specially.		See LEGAL PROFESSION	87
Re KEENAN'S LANDS AND GOODS	260	ADJOURNMENT—	
Passing accounts. Disposal of small balance in hands of administrator.		See LICENSING ACT	9
Re CAMERON'S GOODS	215	ADMINISTRATION—	
Passing accounts. Executors carrying on a business. Subscriptions to local matters on behalf of the business. Commission to executors carrying on a business. Executors carrying on a testator's business in a country town subscribed in the name of the business to local charities and sports.		Appointment of company during administrator's absence. Rescission of appointment. Costs. Upon the application of A., the administrator of an estate, who was desirous of leaving the colony for a time, an order was made purporting to appoint the Union Trustee Company, Limited, administrators in his place. On his return, an application was made to rescind the previous order, A. wishing to resume administration.	
Held, under the special circumstances, that the subscriptions might be allowed as proper expenses of the business.		Held, that the court had power to give leave to A. to rescind the appointment, but that A. must pay the company's costs.	
Although executors carrying on a business under a will are not entitled to a commission on anything beyond their net receipts from the business, their trouble in carrying on the business was considered in fixing the rate of commission allowed on their whole receipts.		An appointment under s. 13 of <i>The Union Trustee Company of Australia, Ltd., Act</i> (54 Vic.), is revocable with the consent of the court.	
Re Walker's will, 6 Q. L. J., 259, followed.		Re M. L. ARCHER'S LANDS AND GOODS	27
Re MOXHAM'S WILL	304	ADMINISTRATORS' AND EXECUTORS' ACCOUNTS—	
Passing accounts. Administrators' and executors' accounts. Surcharge. Jurisdiction of Court. Inquiries by Registrar. 25 Vic., No. 13 Supreme Court Act of 1867 (31 Vic., No. 23) s. 23. Probate Act of 1867 (31 Vic., No. 9), s. 6. Costs.		See ACCOUNTS	219
The Supreme Court has authority, on passing executors' or administrators' accounts in a summary way without action, to examine them and inquire whether they are accurate or erroneous.		ADMINISTRATION—	
The Registrar has authority to inquire and dispose of objections seeking to surcharge an executor or administrator, lodged when the accounts are filed.		Notices of intention to apply. Waiver of irregularity in notices. The Court or a Judge may under special circumstances waive irregularities in the prescribed notices of intention to apply for administration.	
The rules of 1845 (New South Wales) relating to the passing of accounts, are still in force in Queensland.		In the will and codicil of G. L. Matthews	273
Executors and administrators should file and pass their accounts within fifteen months of the grant.		ADMINISTRATION WITH THE WILL—	
		See WILL	154
		AFFIDAVITS—	
		Right to read further affidavits.	
		See PRACTICE	6
		AGREEMENT—	
		See STAMP DUTY	55
		AMENDMENT—	
		Of Writ. See PRACTICE	286
		Of Pleadings. See PRACTICE	58

APPEAL—

<i>See</i> INSOLVENCY	32
<i>Amendment of Pleadings. Guarantee. New trial.</i> R. signed a continuing guarantee for an overdraft by the Union Bank to B. up to £250, and agreed to lodge the certificates for certain shares belonging to B., which were transferred into R's. name as collateral security for the overdraft. B. subsequently wished him to obtain the shares, and R. gave him an order on the bank for the delivery of the certificates. B. took the certificates from the bank, had the shares re-transferred to his own name, and relogged the certificates with the bank. No reference was made to the guarantee. On 11th July, 1893, the bank issued a writ against R on the guarantee, the overdraft then exceeding £250. On 13th July, the bank sold certain of the shares for £256. On the pleadings, the defendant R. denied the execution of the guarantee, and pleaded that if it was executed its execution was procured by fraud. The facts above stated appeared upon the evidence for the plaintiffs. At the close of the evidence the defendant applied for leave to amend by setting up the defence that the guarantee was satisfied. Chubb, J., refused leave to amend, and judgment was entered for the bank on the findings of the jury.	
<i>Held</i> , on appeal by Griffith, C.J., Harding, Real, J.J., that as on the plaintiffs own case the questions arose whether the deposit of the certificates was for the benefit of R. or the Bank, and whether the guarantee was given on the understanding that it was to be given up as soon as the certificates were re-deposited with the bank, and as neither of these questions had been left to the jury, there must be a new trial, with leave to the defendant to amend as he might be advised.	
UNION BANK OF AUSTRALIA, LTD. v RAINE	58
<i>District Court. New trial. Notice. Illegal Distress. District Courts Act (55 Vic., No. 33), ss. 132, 144, 145, 147. Set off. Small Court Judgment.</i> M. rented a house from R. and had also business transactions with him. M. being desirous of determining her tenancy, handed the key of the premises to R., and removed her furniture to another house. At that time M. owed £2 for rent and a larger sum for goods supplied by R. R. distrained upon the furniture so removed. M. brought an action for illegal distress and R. pleaded by way of set off, a judgment in the Small Debts Court against M. in favour of R. The jury found that the distress was not illegal, and Miller, D.C.J., on 18th September, entered judgment for R. on the set off. Notice of appeal was given within the prescribed time, but the appeal was not set down for hearing before the December Sittings of the Full Court.	
On appeal it was objected that the appeal was out of time, and that in any event an application for a new trial should have been made to the District Court.	
<i>Held</i> , that the appeal was within time and that under s. 144 of the District Courts Act, the Supreme Court has jurisdiction to hear an appeal in any of the cases specified in that section, in which the party is dissatisfied with	

the judgment of the District Court, although the proper ruling may be a new trial only.	
<i>Held</i> , also, that as upon the admitted facts the distress was illegal, there must be a new trial.	
A judgment of the Small Debts Court cannot be sued upon now raised as a defence by way of set off, in the District Court.	
MURISON v RANKIN	52
On Costs. <i>See</i> GOLD FIELDS ACT, 1874	307
Criminal. <i>See</i> CRIMINAL LAW	60
From Justices.	
<i>See</i> CERTIORARI	94
From Trustee to Creditors.	
<i>See</i> CONTEMPT OF COURT	312
From Land Board.	
<i>See</i> CROWN LANDS ACT OF 1884	36
Justices Act of 1886 (50 Vic., No. 17), ss. 226, 229. Special case. Time for appeal. The proviso to s. 229 of the Justices Act does not extend the time within which an appeal must be made under section 226 for a special case. The only effect of that proviso is that justices are not to treat an application by the Attorney General for a special case as frivolous.	
McMAHON v PERRY	196
Mining. <i>See</i> GOLDFIELDS ACT, 1874	307
APPOINTMENT—	
<i>Of Trustee Company during Administrator's absence.</i>	
<i>See</i> ADMINISTRATION	27
<i>Of Trustee.</i>	
<i>See</i> INSOLVENCY ACT OF 1874	115
<i>See</i> WILL	183
APPORTIONMENT—	
<i>See</i> COSTS	40
ARRAIGNMENT—	
<i>See</i> CRIMINAL LAW	219
ARREST—	
<i>See</i> CRIMINAL LAW	60
<i>See</i> SHERIFF	175
ARRESTING CONSTABLE—	
<i>See</i> COSTS	163
ARTICLED CLERK—	
<i>Filing of articles. Failure to file articles within time specified. Reg. Gen. as of 12th Dec., 1879, r. 49. An articulated clerk had failed to present his articles for registration within the time prescribed by r. 49 or the Regulæ Generales of 12th December, 1879. Leave was granted to him to file the articles nunc pro tunc.</i>	
Re J. C. McKenna, an Articled Clerk	283
ASSESSMENT OF RENT—	
<i>See</i> CROWN LANDS ACT OF 1884	36, 284
ASSETS—	
<i>Distribution of. See</i> COSTS	80
ASSURANCE FUND—	
<i>See</i> REAL PROPERTY ACT OF 1861	270
AUDITOR—	
<i>See</i> LOCAL GOVERNMENT	67

BANKER AND CUSTOMER—

Action on dishonoured cheque by non-trader. Damages. Post-dated cheque Bankers' right of set-off. Pass books. Bills of Exchange Act of 1884 (48 Vic., No. 10), ss. 3, 4, 11, 12, 13, 14, 74. Action for dishonour of two cheques. Plaintiff, a solicitor's clerk, who had a banking account with defendants, issued to a creditor a post-dated cheque, which was put in circulation by the creditor, and received in the ordinary course of banking exchange by defendants, who paid it, and debited it to plaintiff's account before the date appearing on the face of the cheque. In consequence of this debit, two other cheques drawn by plaintiff were dishonoured.

Held, by Griffith, C.J., and Real, J., that the true date of a post-dated cheque issued by the drawer is the date of its issue, and that defendants, who received the cheque in question from bona fide holders for value, were themselves holders for value, and that the amount of the cheque was properly debited to plaintiff's account before the date appearing on its face.

By Harding, J.: That, without deciding whether a post-dated cheque is a cheque payable on demand, or a bill of exchange payable at a future day, i.e., on the date appearing on its face, that defendants were in either view entitled to debit the amount to plaintiff's account.

Per Griffith, C.J., and Real, J. Any person who ordinarily transacts his pecuniary business by means of cheques on a bank can maintain an action for substantial damages for dishonour of a cheque without proof of special damage.

It appeared from plaintiff's own evidence that before drawing the second cheque, the dishonour of which was complained of, he had, on being informed of the dishonour of the first, obtained from defendants his pass-book, which showed that the post-dated cheque had debited to his account, and that the balance to his credit was insufficient to meet the cheque which he then proceeded to draw. It appeared, also, that he knew that he would not be allowed to overdraw his account.

Per Griffith, C.J., and Real, J. An action could not be maintained for the dishonour of a cheque drawn under such circumstances, both on the ground of estoppel, and on the ground of a suspension by express notice of the implied term of the contract between banker and customer on which the action was based.

Per Harding, J. It is for the jury to say whether the admitted facts would have that effect.

MAGILL v. BANK OF NORTH QUEENSLAND .. 262

BAILMENT—

See NEGLIGENCE 119

BARRISTER—

See LEGAL PROFESSION 70

BENCH WARRANT—

See CRIMINAL LAW 184

BILLS OF EXCHANGE ACT OF 1884 (48 VIC., No. 10).

SS. 3, 4, 11, 12, 13, 14, 74.

See BANKER AND CUSTOMER 262

S. 58. *See PRACTICE* 6

PAGE

BILL OF SALE—

See COMPANY 276

After acquired property described by general words. G., a chemist carrying on business at R. street, Toowoomba, gave a bill of sale to plaintiffs, to secure the repayment of £500 and further advances to be made by them in money or goods in connection with his business. The bill of sale comprised all and singular the stock of chemicals, drugs, &c., and all other the stock in trade of the said G., in the trade or business of a chemist and druggist, or any other business which then was or which might thereafter be carried on by the said G.; household furniture, effects, and things then in, about, or belonging to the shop and premises of G. at R. street; and all book debts, &c.; and all other property whatsoever of the said G. wheresoever situated, which might at any time during the continuance of the security, be acquired by him, and whether the same were used in addition to substitution for, or in connection with the premises thereby assigned, or expressed and intended so to be, or otherwise. And it was expressly agreed by the bill of sale that the security should extend to and comprise, not only the mortgaged property therebefore particularly set out, but also all further businesses, leases, goodwills, &c., of the said G., household furniture, goods, chattels, effects, &c., and all other property whatsoever which the said G. might thereafter acquire or become possessed of, or entitled to during the subsistence of the said security, whether the same might be used either in addition to or in substitution for, or in connection with the said mortgaged property therebefore set out or otherwise.

G. died, and at the time of his death he was carrying on business at the said shop in T., but he resided in another house in the same town, the property of his wife. Before his death he had been accustomed to import chemicals from England, and to store them at his private residence, taking them thence and using them at the shop as required. Certain of the chemicals acquired after the date of the bill of sale were stored at the private house of the time of G.'s death, and there was also in or about his private residence certain household furniture and effects acquired by G. before his death. Plaintiffs claimed that the chemicals and furniture at the testator's residence were included in the bill of sale, but G.'s executor refused to admit their claim.

Held, that the bill of sale included the chemicals stored at testator's residence, and also such of the furniture as he had acquired after the execution of the bill of sale.

IN RE GOODRICH, ELLIOTT BROS. v. CAMPBELL .. 295

BILLS OF SALE ACT OF 1891 (55 VIC., No. 23)—

SS. 3, 8, 9, 10, and 17. *Absolute deed of gift. Renewal of registration.* A husband executed a post-nuptial deed of gift of chattels in favour of his wife, which was registered under s. 3, of 55 Vic., No. 23, but the registration was not renewed within twelve months. The gift was followed by delivery of possession.

Held, that registration was necessary, but that being an absolute assignment and not a security for money renewal was not required by the Bills of Sale Act of 1891.

Re DUNSTAN 1

PAGE

	PAGE		PAGE
S. 17. <i>Bill of sale. Renewal of registration. Re-registration of a Bill of Sale.</i> The mortgagee under a bill of sale having failed to renew the registration of his security within the prescribed time, presented a sworn copy of the bill of sale, and sought registration of it as an original document.		CHOSE IN ACTION—	
<i>Held</i> , that the bill of sale could not be twice registered as an original, and that registration must be refused.		<i>Assignment of.</i> See INSURANCE	202
<i>Re</i> WEBB'S BILL OF SALE	305	CLASSICS—	
BOARD—		<i>See</i> LEGAL PROFESSION	70
<i>See</i> CONTRACT	268	CLAIM OF OWNERSHIP—	
BONA FIDE CLAIM OF RIGHT—		<i>Notice of.</i> See OWNERSHIP	232
<i>See</i> JUSTICES	153	COLLATERAL PRINTED AND WRITTEN SECURITIES—	
BONA FIDES—		<i>See</i> SURETY	186
<i>See</i> REAL PROPERTY ACT OF 1861	270	CODICIL—	
BREACH OF DUTY—		<i>See</i> WILL	285
<i>See</i> ACCOUNTS	260	COMMENT ON MATTER SUB JUDICE—	
"BRISBANE," meaning "CITY OF"—		<i>See</i> CONTEMPT OF COURT	312
<i>See</i> LICENSING ACT	76	COMMISSION—	
BRITISH COMPANIES ACT OF 1886 (50 VIC., No. 31)—		<i>To executors carrying on a business.</i>	
SS. 7, 12, 13. <i>See</i> CROWN LANDS ACT OF 1884 ..	1	<i>See</i> ACCOUNTS	259, 304
S. 10. <i>See</i> STAMP DUTY	55	COMPANY—	
BY-LAW—		<i>Call. Forfeiture of shares. Companies Act, 1863 (27 Vic., No. 4) s. 25, Table A.</i> The articles of association of a company contained a clause that, if any member failed to pay a call within seven days, he should, by mere default alone, and without any proceeding on the part of the company, cease to be a shareholder. A shareholder having made such default, was sued for calls due.	
<i>See</i> LOCAL GOVERNMENT	31	<i>Held</i> , that the shares could be forfeited only at the option of the directors, and no such option having been exercised, the shareholder remained liable.	
BURDEN OF PROOF—		GREAT MONKLAND TRIBUTE CO., LTD. <i>v.</i> FREEMAN	112
<i>See</i> CONTRACT	270	<i>Debenture. Floating security. Bill of sale. Lien ticket. Goldfields Act of 1874 (38 Vic., No. 11) Reg. 38. Foreclosure. Form of order.</i> A limited company, by six debentures at different dates, charged all its present and future real and personal property and interest in lands, and all its plant, machinery, debts goodwill, chattels, effects, and assets, and generally all its property real and personal, for the repayment of the sums and interest secured thereby. The debentures were to be a floating security, and the moneys so secured were to be payable if default were made in payment of principal or interest for 21 days. A bill of sale was subsequently given by the said company over certain machinery and plant as collateral security to the said debentures, and a lien ticket under regulation 38 of <i>The Goldfields Act of 1874</i> was also given as security collateral with the bill of sale. Default having been made in the payment of interest in the first debenture, application was made for foreclosure on all the property comprised in the debentures, bill of sale, and lien ticket.	
<i>See</i> LICENSING ACT	199	A declaration of charge, and a direction for inquiry and account, were made, and in default of payment, the company was ordered to do all acts and execute all conveyances necessary for vesting in the plaintiff the property comprised in the debentures, bill of sale, and lien ticket.	
CALLS—		<i>Sadler v. Worley</i> (1894) 2 Ch. 177, followed.	
<i>See</i> COMPANY	112	POYSEY <i>v.</i> MT. SHAMROCK GOLD COMPANY, LTD., AND ANOTHER	276
CANCELLING—		<i>Proof of incorporation.</i>	
<i>See</i> WILL	261	<i>See</i> CRIMINAL LAW	209, 313
CAVEAT—			
<i>See</i> REAL PROPERTY ACT OF 1861	68		
CEMETERY ACT, 1865, (29 VIC., NO. 15)—			
S. 36. <i>Disturbance.</i> A conviction against persons for creating a disturbance during a funeral service was quashed, as the information did not state that the disturbance was wilfully committed.			
HOLLAND <i>v.</i> HARTFORD	86		
CERTIORARI—			
<i>Discretion. Conduct of applicant. Appeal from Justices.</i> The grant of <i>certiorari</i> is in the discretion of the Court, and even where a person is aggrieved he may have acted in such a way as to preclude his making an objection to jurisdiction.			
An appeal from an order of justices was heard in the District Court, and dismissed on the merits. A writ of <i>certiorari</i> was applied for, on the ground that one of the justices was an interested party; the fact of the appeal was suppressed at the application for the <i>rule nisi</i> . The Full Court refused the writ.			
R. <i>v.</i> CASTLES AND OTHERS (JUSTICES)	94		
<i>See</i> LICENSING ACT	9, 76		
CHALLENGES—			
<i>See</i> CRIMINAL LAW	281		
CHARITABLE BEQUEST—			
<i>See</i> WILL	44		

	PAGE
COMPANIES ACT, 1863 (27 VIC., No. 4)—	
S. 108. See COSTS	30
S. 25, Table A. See COMPANY	112
CONDITION PRECEDENT—	
See CONTRACT	270
See PRACTICE	185
CONFESSION—	
See CRIMINAL LAW	63, 224, 283
CONSIDERATION—	
For agreement to give time. See SURETY	186
CONSTITUTION—	
<i>Jurisdiction of Supreme Court to review proceedings of Legislative Assembly. Judicial powers of Assembly in matters of order. Constitution Act of 1867 (31 Vic., No. 38) s. 8. Action by member against Speaker of Legislative Assembly to recover damages for exclusion under order of suspension made by the Assembly. The Standing Orders provided as follows:—</i>	
<i>Disturbance by Members.</i>	
166. A member shall not make any noise or disturbance while a member is orderly debating, or while any matter is under consideration, and in case such noise or disturbance is made and persisted in after warning from the Chairman, the Chairman shall call by name upon the member making the same, and if he does not immediately desist, shall report his conduct to the House, and such member will incur the displeasure and censure of the House, and may be suspended from the service of the House for such period as the House may think fit.	
<i>Held, that Standing Order 166 is within the powers conferred on the Legislative Assembly by s. 8 of The Constitution Act of 1867.</i>	
Evidence of facts antecedent to the report of the chairman on which the order of suspension is made is not admissible.	
The Court will not enquire into the regularity of the procedure of the Legislative Assembly in the exercise of its powers.	
<i>Taylor v. Barton</i> (11 App. Cas., 197), <i>Bradlaugh v. Gossett</i> (12 Q.B.D., 271), and <i>Haggard v. Pelicier Freres</i> (1892 A.C., 61) considered.	
BROWNE v. COWLEY	234
<i>Legislative Assembly. Suspension of members. Standing Orders. Jurisdiction of the Supreme Court.</i> As the Legislative Assembly has power under its Standing Orders, pursuant to s. 8 of <i>The Constitution Act of 1867</i> , to regulate its internal procedure relating to orderly conduct, the Supreme Court has no jurisdiction to take cognizance of the mode in which a resolution for the suspension of a member was passed.	
Judgment of Griffith, C.J., (<i>ante</i> p. 234) affirmed.	
<i>Bradlaugh v. Gossett</i> (12 Q.B.D., 271) followed.	
BROWNE v. COWLEY	254
CONSTITUTION ACT OF 1867 (31 VIC., No. 38)—	
S. 8. See CONSTITUTION	234, 254
CONTEMPT OF COURT—	
<i>Comment on matter sub judice. Appeal from trustee in an insolvent estate to creditors.</i> Plaintiff, who was the trustee in an insolvent estate, brought an action against defendant to set aside a bill of sale given by the insolvent, of which defendant was the assignee. While the	

	PAGE
action was pending, defendant issued to the creditors in the insolvent estate a printed circular, giving his version of his dealings with the insolvent, and of the circumstances under which he became assignee of the bill of sale, and asking them to sign a document declaring that they disapproved of the action, and to cause all further proceedings in it to be stopped.	
<i>Held, that defendant was not, by his action in sending the circular, guilty of a contempt of court, and that the circumstance that the creditors might also be witnesses made no difference.</i>	
CASTLES v. ROESSLER	312
CONTRACT—	
<i>Contract for board. Implied condition of good behaviour. Immorality.</i> Defendant, by a written agreement, agreed to provide plaintiff with board for three years at a fixed rate. The agreement contained no provision as to the plaintiff's behaviour. Before the three years had elapsed, defendant, on the ground of plaintiff's alleged immorality with defendant's female servant, refused to supply him further with board.	
<i>Held, that the breach of contract was not justified by the alleged immorality.</i>	
<i>Seemle</i> (Griffith, C.J., and Rea, J.), that it is an implied condition of a contract involving a personal relation between the parties, that neither party will be guilty of such misbehaviour as would render the continued performance of the contract an intolerable burden to a reasonable person.	
<i>Per Harding, J.</i> Immorality not being illegal, and the parties to a contract having the power to provide in the contract against it, no condition of good behaviour can be implied.	
MULHOLLAND v. KING	268
<i>Impossible condition.</i> An action will not lie on a covenant to pay money upon a condition the performance of which is legally impossible.	
MUNICIPALITY OF ROCKHAMPTON v. INGHAM	256
<i>Performance of condition precedent. Burden of proof.</i> An agreement in writing between W. and M. that, in consideration of M.'s transferring to H. the license, goodwill, and furniture of an hotel, W. would become surety to M. for the payment by H. of £300, and would endorse H.'s promissory-notes for that amount, contained the following words:— "This agreement being conditional upon the said H. giving a bill of sale over the said hotel, license, and furniture prior to the transfer of the license." M. transferred the license, &c., to H. No bill of sale was executed by H., and W. refused to sign the promissory-notes. M. brought an action against W. for specific performance of the agreement, or for damages.	
<i>Held, that the signing of the bill of sale was a condition precedent to W.'s liability, and that the action failed.</i>	
MALONE v. WRIGHT, HEATON AND CO.	270
<i>Sale of goods. Delivery. Rescission. Local Government Act of 1878 (42 Vic., No. 8) s. 160. Local Authorities (Joint action) Act of 1886 (50 Vic., No. 16) s. 18. Contract under seal.</i> With the Brisbane Bridges and Ferries Board, the plaintiffs entered into an agreement to build a	

punt, place it on a ferry and run it for two months. The plaintiffs alleged delivery, payment on account, and sued for the balance. The defendants denied the contract; alleged that if made, it was not under seal; that it was not in writing, as required by the Statute of Frauds, and that before any breach the contract was rescinded by a new agreement.

The jury found that there was an agreement to build contained in certain of the exhibits; that the agreement though not under seal, was signed by the president, or two members of the corporation for the purpose of the contract acting by direction; that the punt was built in accordance with the plan, but was not delivered, and that there was a rescission before breach.

Harding, J., entered judgment for the defendants.

Held, on appeal by COOPER, CHUBB, AND REAL, JJ., that the contract was proved in the facts, that the punt was delivered, and there was no rescission of the contract.

CLARK AND FAUSET v. MUNICIPALITY OF BRISBANE
AND ANOTHER 131

CONTRACT UNDER SEAL—
See CONTRACT 131

CONTRIBUTORY NEGLIGENCE—
See NEGLIGENCE 119
See CRIMINAL LAW 80

CONTRIBUTORIES—
See COSTS 30

CONTRIBUTION—
See GOLD FIELDS ACT 1874 307

CONVEYANCE—
See STAMP DUTY 55

CORROBORATIVE EVIDENCE—
See CRIMINAL LAW 151

COSTS—
See ACCOUNTS 219
See ADMINISTRATION 27
See INSOLVENCY 259
See PRACTICE 6

Against the Crown. Costs were given against justices on the hearing of an order *nisi* for *mandamus*, as the Crown Solicitor had instructed counsel to appear on their behalf to show cause.

R. v. ELECTORAL JUSTICES OF TOOMBUL .. 89

A quashing order was made absolute with costs against a trustee of a cemetery who had laid the information against the appellant, and who failed to prevent the proceedings on appeal, although he knew the original proceedings were improperly instituted.

HOLLAND v. HARTFORD 86
See CROWN LANDS ACT OF 1884 36
See ELECTIONS ACT, 1885 88

Order as to costs part of judgment—
See GOLD FIELDS ACT, 1874 307

Out of estate.
See ACCOUNTS 219
See INSANITY ACT OF 1884 314
See WILL 278

Apportionment. Divorce. Counter charges. In an action for divorce the petitioner made certain charges of misconduct against the co-respondent, and the co-respondent, besides denying these charges, made counter charges of misconduct against the petitioner. The petitioner failed in his case, and the co-respondent was unable to prove his charges. *Harding, J.*, ordered the petitioner's costs of, and occasioned by the counter charges raised by the co-respondent, to be taxed and paid by the co-respondent, the co-respondent's costs of his defence (except such costs as aforesaid) to be paid by the petitioner.

Held, by Griffith, C.J., Cooper and Real, JJ., that on that order the petitioner was entitled to a complete indemnity for the expenses to which he had been put by the counter charges, and the co-respondent complete indemnity for his defence in defending the suit, except so far as he had increased them by the counter charges; and that it did not mean that there should be a general apportionment of the costs of the suit.

O'BRIEN v. O'BRIEN AND ANOTHER .. 40

Company. Costs of winding-up. Contributories. Successful litigant. Insufficient Assets. Priority. Companies Act, 1863 (27 Vic., No. 4) s. 108. On an unsuccessful application by the liquidator of a company to settle certain persons on the list of contributories, the costs of all parties were allowed out of the assets. The assets were insufficient, and on an application under s. 108 of *The Companies Act, 1863*, for directions as to priority, Griffith, C.J., directed the priority to be (1), the liquidator's actual and proper expenses of realization; (2), the costs of the shareholders who were successful in the above said application; (3), the liquidator's costs of the litigation with them, and ordered the costs of the summons for direction to be added to the costs of the parties, and subject to the same order as to priority; the whole order to be without prejudice to the rights of any other persons to whom costs may have been ordered to be paid out of the estate.

Re Dominion of Canada Plumbago Co., 27 Ch.D., 37, followed.

Re THE PUST OWNERS ASSOCIATION, LTD. .. 30

Crown Solicitor. Solicitors Act of 1891 (55 Vic., No. 22), s. 3. Customs Act 1873 (37 Vic., No. 1), s. 237. When costs are awarded to an officer of the Crown, they are to be taxed in the ordinary way, notwithstanding that the officer appeared by the Crown Solicitor, who receives a fixed yearly salary.

Attorney-General v. Shillibeer (4 Ex., 606), followed.

Decision of *Real, J.*, reversed.

IRVING v. GAGLIARDI, *Ex parti* GAGLIARDI .. 200

District Courts Act, 1891 (55 Vic., No. 33), ss. 120, 123. Interpleader. Amount under £10. Scale of costs. The District Court Rules do not provide any scale of fees for cases under £10.

Held, that a District Court Judge has no power in such a case to order the costs of the successful party to be taxed on any scale.

Semble, that he has power to order the unsuccessful party to pay a fixed sum for costs.

KEOGH v. BLAKE 213

	PAGE		PAGE
<i>Divorce. Practice. Rule 14. Cross-examination by party not answering.</i> A co-respondent who has filed no answer is not entitled on the hearing to cross-examine the witnesses for the purpose of showing that he ought not to be condemned in costs.		CRIMINAL LAW—	
<i>PARKER v. PARKER AND AH SAM</i>	145	29 Vic. No. 11, ss. 15, 16. <i>Attempt to discharge a loaded arm. Failure of attempt from want of priming or other cause.</i> A revolver, loaded in some of its chambers, and capable of being discharged if the trigger is drawn a sufficient number of times, is a loaded arm within the meaning of 29 Vic., No. 11, s. 16.	
<i>Mandamus. Special case.</i> Where the relief sought could have been obtained by a special case and the appellant proceeded by way of mandamus, his costs as the successful party were limited to those of a special case.		The prisoner drew the trigger of a six-chambered revolver, which was loaded in three consecutive chambers, three times, the hammer falling upon the empty chambers. Before he had time to draw the trigger a fourth time, the weapon was knocked out of his hand.	
<i>R. v. LICENSING JUSTICES OF NORTH BRISBANE</i>	95	<i>Held</i> , there was evidence of an attempt to discharge loaded arms.	
<i>Practice. Solicitor and Client. Taxation.</i> The costs of a country solicitor attending in town are an unusual expense to be allowed between party and party. In order that a country solicitor attending in town may recover such costs as between solicitor and client, he must have warned his client that such expenses might not be allowed on a party and party taxation, and that the client might have to pay them himself.		<i>R. v. TRACEY</i>	272
<i>Re Blythe and Fanshawe</i> (10 Q.B.D., 207) followed.		<i>Appeal. Order XXXI, r. 4 (Crown side)</i>	
<i>IN RE DWYER</i>	227	As a general rule, a Crown case reserved for the opinion of the Supreme Court will not be heard unless the papers are delivered to the judges four clear days before the hearing, as prescribed by <i>Order XXXI, r. 4 (Crown side.)</i>	
<i>Prohibition.</i> An appellant was deprived of all costs of evidence on an application for a prohibition owing to the voluminous and irrelevant affidavits filed by him.		<i>R. v. JACK</i>	61
<i>RAVEN v. CLEVELAND DIVISIONAL BOARD</i>	67	<i>Arraignment. Deaf mute. Insanity.</i> A person charged with murder was found mute by the visitation of God. A fresh jury was impanelled to try whether he was sane or not. Evidence was given that he had not sufficient intellect to understand the proceedings so as to make a proper defence, challenge the jurors, or comprehend the details of the evidence. <i>Harding, J.</i> , directed the jury, if they thought he had not sufficient intellect therefore, to find him insane. The jury did so, and the prisoner was ordered to be detained to be dealt with under <i>The Insanity Act of 1884. Regina v. Pritchard</i> (7 C. & P., 303) followed.	
<i>Quashing order. Arresting constable.</i> On an application to quash a conviction by justices, costs will not be given against a police constable who has only done his duty in arresting the defendants, and has not supported the conviction.		<i>R. v. KOVALKY</i>	219
<i>R. v. WHELAN</i>	165	<i>Criminal Law Amendment Act of 1891 (55 Vic., No. 24), s. 4. Limitation of time. Arrest.</i> When a man is apprehended on a charge of an offence the nature of which is such that upon an information charging him with it he might be convicted of the offence with which he is actually charged in the information, that apprehension is a commencement of the prosecution for the latter offence.	
<i>Solicitor's lien. Money in court. Next friend of infants.</i> The next friend of E. and A. Forbes, infant children of J. W. F., who died intestate, retained H to take proceedings against the administrator of J. W. F.'s estate to compel him to render an account of his administration. The administrator was ordered to pay the money into court, and the costs of the next friend were allowed out of the estate of J. W. F., the administrator being disallowed his costs. There were no costs available for payment of the next friend's costs, and H. then prayed for a declaration of a charge on the money in court to the extent of such costs, and that such costs should be paid to the petitioner with the costs of the application.		On a charge of an offence under sec. 4 of <i>The Criminal Law Amendment Act of 1891</i> , proof by parol that the prisoner was apprehended on a charge, then stated to him, of rape, on the same person.	
<i>Held</i> , that the next friend's costs might be paid out of the money in court, and that the petitioner was entitled to a charge on the fund in court, but that he should not recover any of the costs of, and occasioned by the application, as the petitioner believed the administrator had assets to pay the costs of the next friend.		<i>Held</i> , sufficient evidence of the commencement of the prosecution.	
<i>Re FORBES' GOODS</i>	29	<i>R. v. Phillips</i> (R. & R., 396) explained.	
COUNTERCHARGES—		<i>REGINA v. JACK</i>	61
<i>See COSTS</i>	40	<i>Criminal Law Amendment Act of 1891 (55 Vic., No. 24), ss. 3, 4, 10. Rape. Want of corroborative evidence. Indecent assault.</i> A prisoner charged with rape on a child under 12 years of age was found guilty of an attempt to have unlawful carnal knowledge under s. 4 of <i>The Criminal Law Amendment Act of 1891</i> , and of an indecent assault. There was no corroborative evidence implicating the accused.	
COVENANTS—			
<i>Joint and several. See SURETIES</i>	186, 289		
<i>See REAL PROPERTY ACT OF 1861</i>	84		

- Held*, that the conviction as to attempt must be quashed, but the conviction for indecent assault affirmed.
- R. v. MCGEE 151
- Criminal Law Act Amendment Act of 1894, s. 10. Crown case reserved. Evidence. Admission made by prisoner after arrest in answer to questions by a constable.* A., having been arrested on a criminal charge, made a statement implicating B. in the charge. B. was afterwards arrested, and the arresting constable, in A.'s presence, read over A.'s statement, which had been reduced into writing, to B. During the reading of the statement, B. made a further statement to the constable.
- Held*, that B.'s statement was admissible against him.
- R. v. Thornton (1 Moo. C.C. 27), R. v. Rogerson (9 Sup. Ct. Rep. (N.S.W.) 234), and R. v. Many Many (6 Q.L.J., 229) followed.
- R. v. Thompson (1893, 2 Q.B. 12) distinguished.
- R. v. TIM CROWN 283
- Crown case reserved. Embezzlement. General deficiency.* 54 Vic., No. 5. 36 Vic., No. 8, s. 1. *Respite of sentence.* A member and paid secretary of an Oddfellows lodge may be convicted of embezzling sums of money, the property of the lodge.
- On a charge of embezzling specific sums, evidence of a general deficiency in the accounts is admissible.
- Seem*, that when a prisoner is convicted, and a case reserved for the opinion of the Full Court, the sentence should either be respited, or bail allowed until judgment is given.
- R. v. HOUSTON 145
- Embezzlement. Evidences of incorporation of company.* 57 Vic., No. 1. The court will take judicial notice of the existence of an incorporated company mentioned as such in a statute.
- It is not necessary on a charge of embezzlement from such a company to prove its incorporation.
- R. v. CONNELL 209
- Embezzlement. Proof of incorporation of company. Crown case reserved.* On the trial of W. for embezzling moneys, the property of The New York Life Insurance Coy., evidence was given that a company carried on business in Brisbane under that name. No other evidence was given of the incorporation of the company in Queensland or elsewhere, nor was the name of any member of the company proved. W. was found guilty.
- Held*, on a Crown case reserved, that there was no evidence of the existence of the company as a corporation as distinguished from a partnership, and that, as no evidence had been given of the name of any partner, the conviction must be quashed.
- R. v. WHITEHOUSE 313
- Evidence. Confession. Answers to questions put by a police constable after arrest* (58 Vic., No. 23), ss. 2 and 10. A confession elicited by questions put to a prisoner by a police constable after arrest, and without caution, is admissible against the prisoner unless the answers have been induced by a threat or promise
- R. v. Gavin (15 Cox, 656), and R. v. Male (17 Cox., 689) not followed.
- R. v. MANY MANY, AND OTHERS 224
- Evidence. Murder. Husband and wife.* A man and a woman at Sydney, N.S.W., went through a ceremony which they believed to be a marriage ceremony according to the Mahomedan faith, before a person whom they believed to be a Mahomedan priest, and they subsequently lived together as man and wife.
- The woman was tendered as a witness against the man on a charge of murder.
- Held*, that the validity of the marriage must be determined by the judge as a question relating to the admissibility of evidence. The marriage being held to be invalid, the woman's evidence was admitted.
- R. v. FUZIL DEEN 302
- Evidence and Discovery Act (31 Vic., No. 13), s. 64. Untrue representation. Confession.* M. was charged with having stolen certain gold, the property of the Mount Morgan Company. G., a private detective, who had worked himself into M.'s confidence, gave evidence that he told M. he came from South Africa, and had done business in diamonds, where a fellow could make a little money, if he were so inclined. M. replied "a man can make a little money here if he goes the right way about it." G. then, by means of false statements induced M., by promising to participate in the gold robberies, to admit that he had in his possession some gold scraped from the company's retorts. The statements were admitted to be false. The evidence was admitted and the prisoner convicted.
- Held by Harding and Reel, JJ*, that these representations being untrue, and being made after the subject matter of the charge had been taken, all subsequent material confessions of M. were inadmissible in evidence, as being adduced by such false statements, and that the conviction must be annulled.
- R. v. MANGIN 63
- Jurisdiction. Judicial notice. Pacific Islanders' Protection Act, 1872 (35 and 36 Vic., c. 19), s. 9, (38 and 39 Vic., c. 51), s. 6.* On an information against certain prisoners for an alleged breach of s. 9 of 35 and 39 Vic., c. 19, a question arose whether the island of Malaya was part of Her Majesty's dominions or within the jurisdiction of any civilised Power. The presiding judge directed a letter to the Governor of Queensland, and received a reply that it was not, but that it was under the protectorate of Her Majesty the Queen. From an Order-in-Council, under s. 6 of 38 and 39 Vic., c. 51, setting out the limits of dominion, it appeared that Malaya was not part of Her Majesty's dominions, nor within the jurisdiction of any civilised Power.
- Harding, J.*, held he had sufficient information to take judicial notice of the position of the island, and decided that the court had jurisdiction to try the information.
- .. R. v. VOS AND OTHERS 215
- Jurors. Challenges. Order to stand by. Proceedings in absence of jury. Evidence. Dying declaration.* A juror coming to the book to be sworn had put out his hand, and had touched but not grasped the book, when he was called upon by the Crown to stand by.

Held, that the order to stand by was not too late. The time during the empanelling of a jury at which the Crown shall show cause for their challenge is in the discretion of the court.

The whole of the proceedings in a criminal trial must be in the presence of the jury.

On the trial of A. for murder, a statement by the deceased person (B) was tendered as a dying declaration. At the time of her making the statement, B. was in danger of her life from blood-poisoning, of which she died five weeks later. She was informed by her medical attendant that she would never recover. She said, "Let me die." A magistrate was then brought, who said to her, "Are you sure you will never recover?" She said, "Yes." She then made the statement in question, which was reduced into writing by the magistrate. He then read the statement over to B., and she said it was correct. The magistrate then said, "Do you expect ever to recover?" B. said "No." The magistrate then said, "This is your dying declaration. Will you sign it?" B. signed it.

Both before and after the making of the statement B. asked her nurse, "Do you think I shall die?" The nurse said, "No."

The statement contained the words, "Being in a serious state and not expecting to recover."

Held, that the statement could not be admitted.

R. v. FREEMAN 281

Larceny Act of 1865 (29 Vic., No. 6), s. 76. *Embezzlement*, (54 Vic., No. 5, s. 1.) When an offence under s. 76, of *The Larceny Act of 1865* relates to a valuable security it is sufficient to allege the embezzlement to be of money without specifying any valuable security; and the allegation so far as it relates to a valuable security, will be proved if the offender is proved to have embezzled any amount or part of the particular valuable security.

It is not necessary to prove that the deficiency unaccounted for did not consist entirely of securities where the sum is made up money and securities.

Since 54 Vic., No. 5, it is immaterial that more than three separate sums were included in the deficiency.

R. v. Kéna (L.R. 1 CC.R. 113) discussed.

R. v. ROYLE 146

Manslaughter. Crown case reserved. Contributory negligence. Where the death of a person is caused by the culpable negligence of the prisoner, the fact that the deceased could have escaped by the exercise of reasonable care is no answer to a charge of manslaughter.

R. v. BUNNEY 80

Murder. Practice. Statement of prisoner read to jury. A prisoner was allowed to read a statement to the jury after his counsel's address, and the Crown Prosecutor was allowed a reply on the new matter.

R. v. Shimmin (15 Cox, 122) followed.

R. v. ROSS 261

Prisoner committed for trial, but unable to be brought to Circuit town through illness. Form of bench warrant 184

CRIMINAL LAW ACT AMENDMENT ACT OF 1894 (58 Vic., No. 23) s. 10—

See CRIMINAL LAW 283

CROSS-EXAMINATION—

Right of. See COSTS 145

CROWN CASE RESERVED—

See CRIMINAL LAW.

CROWN—

Costs against. See CROWN LANDS ACT OF 1884 .. 86

See ELECTIONS ACT OF 1885 88

CROWN SOLICITOR—

See COSTS 200

CROWN LANDS—

See GOLDFIELDS ACT, 1874 98

CROWN LANDS ACT OF 1884 (48 Vic., No. 28)—

ss. 17, 18, 21. *Land Board. Assessment of rent.*

Appeal. Successful party. Costs against Crown. 20 Vic., No. 3, s. 1. *Supreme Court Act of 1867* (31 Vic., No. 23), s. 58. On an inquiry before the Land Board, the rent of Galwey Downs was assessed at 22s. per square mile. The lessee appealed to the Supreme Court, contending the rent should be about 12s. 6d. per square mile. Harding, J. fixed the rent at 20s., considered the appellants the successful party, and gave costs against the Crown.

Held, on appeal by Griffith, C.J., Cooper and Real, JJ., that there is a clear indication of intention in *The Crown Lands Act of 1884* that the ordinary costs of inquiries before the Board, which are necessary and unavoidable, should be borne by the Crown and the parties respectively, each party bearing their own, and that the board cannot properly grant costs, either in favour of or against the Crown, unless for "good cause," and that the same rule applies to an appeal to the Supreme Court, which is a continuation of the proceedings before the board.

Held, also, that the appellants were no more substantially successful on the appeal than the Crown; that there were no circumstances to show that the costs of the appeal were more than ordinary or necessary; and that, on that ground, the Crown's appeal must be allowed, but without costs.

Per Griffith, C.J.: Section 58 of *The Supreme Court Act of 1867* does not exclude the prerogative rights of the Crown to be exempt from the payment of costs in cases in which that prerogative has not been otherwise excluded.

Re POWELL 36

ss. 21, 30 (5). *Lease. Rent for second period. Relative value.* In considering "the relative value" of a holding under *The Crown Lands Act of 1884*, in order to assess the rent for the second period, the Land Board must regard, amongst other things the matters specified in s. 30, sub s. 5., a, b, c, d.

Re THE WESTERN QUEENSLAND PASTORAL COY. 234

ss. 48, 65, 67. *Mortgage. Possession by mortgagee. Recovery of land. Foreign Company. Liquidation. British Companies Act of 1886*, ss. 7, 12, 13. D., the lessee grazing farm under *The Crown Lands Act of 1884*, by memorandum of mortgage in the form Schedule IV. to that Act, mortgaged his farm to G. M. & Co., subject to certain covenants in a stock mortgage

	PAGE		PAGE
previously executed between the same parties <i>mutatis mutandis</i> . D. made default in payment and died. His widow continued in possession. The mortgagees entered into possession and tried to sell by public auction, but without success. The widow refused to give up possession of an hotel on the farm and the mortgagees brought an action for the recovery of the land. After the proceedings had been commenced, plaintiff company, whose head office was in Victoria, was wound up and an official liquidator appointed, and a scheme of reconstruction approved. A winding-up petition was also presented in New South Wales. No order for winding-up was made in Queensland where the company was registered under <i>The British Companies Act of 1886</i> . The official liquidator sanctioned the continuation of the action.		DEAF MUTE—	
<i>Held</i> , that default having been made in the payment of the money due under the mortgage a debt was created, and the official liquidator appointed in Victoria, representing the company, was entitled to possession of the land under <i>The Crown Lands Act of 1884</i> .		See CRIMINAL LAW	219
<i>Held</i> , also, that there being no governing authority in Queensland, and no Queensland liquidator, the company itself might have continued the action.		DEBENTURE—	
<i>Quære</i> , whether realty in Queensland would vest in the liquidator of a foreign company since <i>The British Companies Act of 1886</i> , unless an order for winding-up had been made in Queensland.		See COMPANY	276
<i>Selkirk v. Davies</i> , 2 Dowl. 230; <i>Banco de Portugal v. Waddell</i> , 5 App. 161, followed.		DEFAULT—	
GOLDSBOROUGH, MORT & Co., LTD., v. DOYLE.. 1		See REAL PROPERTY ACT OF 1861	83
CURATOR IN INSANITY—		DELIVERY—	
See INSANITY ACT OF 1884	314	See CONTRACT	131
CUSTOMS—		DELUSIONS—	
<i>Customs Duties Act of 1888</i> (52 Vic., No. 5) s. 3, 8.		See WILL	278
<i>Customs Act, 1873</i> (37 Vic., No. 1), s. 215.		DEMURRER—	
<i>Valuation. Fraudulent entries. Forfeiture. Justices Act</i> (50 Vic., No. 17), ss. 209, 210.		See PRACTICE	185
An information under s. 8 of <i>The Customs Duties Act of 1873</i> may be laid by the Collector of Customs.		DESERTED WIFE—	
The mere committal of an act likely to defraud the revenue is a complete offence without any proof of intention.		See MAINTENANCE	72
The word "offence" in s. 8 of the <i>Customs Duties Act of 1873</i> implies some act contrary to the provisions of the statute.		DETENTION—	
It is necessary to prove that the goods were undervalued as a fact, and if, in the opinion of the Collector of Customs, such under-valuation was made with the intention of avoiding the payment of duty, the liability accrues.		See SHERIFF	175
Justices have power under that act to forfeit goods exceeding £100 in value.		DETINUE—	
IRVING v. GAGLIARDI	155	See OWNERSHIP	232
CUSTOMS ACT, 1872 (37 VIC., No. 1), s. 215—		DEVISE—	
See CUSTOMS	155	For life or in fee. See WILL	287
See COSTS	200	DEVISEE IN TRUST—	
DAMAGES—		Death of, before testator. See WILL	183
See BANKER AND CUSTOMER	262	DISCRETION—	
See INSURANCE.. .. .	202	See CERTIORARI	94
		Of a judge as to costs. See GOLDFIELDS ACT, 1874	307
		DISHONOURRED CHEQUE—	
		See BANKER AND CUSTOMER	262
		DISQUALIFICATION OF JUSTICES—	
		See JUSTICES	9
		See LOCAL GOVERNMENT	67
		DISTRESS—	
		See INSOLVENCY	208
		Illegal. See APPEAL	52
		DISTRICT COURT—	
		See APPEAL	52
		DISTRICT COURTS ACT OF 1891 (55 VIC., No. 38)—	
		ss. 120-123. See COSTS	307
		ss. 132, 144, 145, 147. See APPEAL	52
		DISTURBANCE—	
		See CEMETERY ACT, 1865	86
		DIVORCE—	
		See COSTS	41, 145
		DYING DECLARATION—	
		See CRIMINAL LAW	281
		ELECTIONS ACT OF 1885 (49 VIC., No. 13)—	
		ss. 6, 28, 31, 33. Elections Act of 1892 (56 Vic., No. 7), s. 3. Form of claim. Sufficiency of description of place of abode. In a form of claim to be registered as an elector, the place of abode required to be specified by s. 8 of <i>The Elections Act of 1892</i> , was described as "Oriol Road, Hendra." At the Quarterly Registration Court the claimant did not appear, and a letter posted to the claimant by the Electoral Registrar to that address was delivered there on the day after posting. Some of the justices also had local knowledge of the district. There were only two houses in that road. The court rejected the claim	

	PAGE		PAGE
on the ground that the description of the abode did not enable it to be clearly and easily identified.		FORFEITURE—	
<i>Held</i> , by Harding and Real, JJ. (Griffith, C.J., dissentiente), that the description was sufficient, and a writ of <i>mandamus</i> was granted to place the claimant's name on the roll.		See CUSTOMS	155
R. v. ELECTORAL JUSTICES OF TOOMBUL ..	88	See LICENSING ACT	197
ELECTIONS ACT OF 1892 (56 VIC., No. 7)—		Of shares. See COMPANY	112
s. 3. See ELECTIONS ACT OF 1885	88	FRAUD—	
ELECTORAL CLAIM—		See REAL PROPERTY ACT OF 1861	270
Form and sufficiency of.		FRAUDULENT ENTRIES—	
See ELECTIONS ACT OF 1885	88	See CUSTOMS	155
EMBEZZLEMENT—		GENERAL AVERMENT—	
See CRIMINAL LAW	145, 146, 209, 313	See PRACTICE	185
ENTITLING OF DOCUMENTS—		GENERAL WORDS—	
See TRUSTEES AND INCAPACITATED PERSONS ACT OF 1867	260	Property described by. See BILL OF SALE ..	294
EQUITY ACT OF 1867 (31 VIC., No. 18)—		GOLDFIELDS ACT OF 1874 (38 VIC., No. 11)—	
s. 53. See NOTARY PUBLIC	273	ss. 2, 10, 14. Mining lease. <i>Trespass. Crown Lands. Royal Mine.</i> The plaintiff applied for a mining lease of land situated within the Charters Towers Goldfield, which had been granted in fee to other persons. Before the application was granted the defendant, not being the occupier of such lands, by means of a side drive from the adjoining land entered upon a gold-bearing reef six hundred feet under the surface and removed gold therefrom. The plaintiff sued the defendant under s. 14 of <i>The Gold Fields Act of 1874</i> for trespass.	
ESTOPPEL—		<i>Held</i> , a royal mine under land granted in fee is not Crown lands within the meaning of <i>The Gold Fields Act of 1874</i> , and cannot be leased for mining purposes.	
See SHERIFF	175	<i>Held</i> (Griffith, C.J., and Real, J.) that a grant in fee from the Crown confers upon the grantee possession of a royal mine lying under the land, that an action is maintainable at his suit against a trespasser working the mine without license or authority from the Crown.	
EVIDENCE AND DISCOVERY ACT OF 1867 (31 VIC., No. 13.)—		<i>Plant v. A.S.; 5 Q.L.J., 57, overruled.</i>	
s. 64. See CRIMINAL LAW	63	PLANT V. ROLLSTON	98
EVIDENCE—		s. 74 Reg., 25. Mining. Mining appeal from District Court Judge and assessors. Appeal on question of costs. Judges discretion. Order for costs part of judgment. <i>Gold Mines Drainage Act of 1891, s. 10.</i> Contribution for expenses of pumping. An appeal does not lie from a decision of a District Court Judge as to the costs of an appeal from a Warden's Court: <i>Aliter</i> if the judge did not, in fact, exercise any discretion as to the costs.	
See CRIMINAL LAW	145, 146, 209, 224, 313	An erroneous application of a real or supposed rule of law adopted by a judge as a guide in the exercise of his discretion as to costs is not ground for appeal.	
See PRACTICE	145, 153, 268	In deciding between parties to an action, a tribunal is not bound by a statement of facts agreed upon by one party and other persons not parties to the action.	
Admission by accused after arrest.		No. 1 NORTH PHOENIX G. M. COY., LTD., v. PHOENIX G. M. COY., LTD.	307
See CRIMINAL LAW	224, 283	ss. 32, 67. Jurisdiction Warden's Court. Sale of residence area. S. 32 of 38 Vic., No. 11, does not confer exclusive jurisdiction on the Warden's Court to hear an action for money due on the sale of a residence area.	
Of alleged wife against husband.		LEE GOW V. WILLIAMS. <i>Ex parte WILLIAMS</i> 232	
See CRIMINAL LAW	302	GOLDFIELDS ACT OF 1874 (38 VIC., No. 11)—	
Of desertion. See MAINTENANCE	72	See COMPANY	276
Dying declaration. See CRIMINAL LAW ..	281	GOLDFIELDS DRAINAGE ACT OF 1891 (55 VIC., No. 26)—	
Wrongful admission of See JUSTICES ..	153	s. 10. See GOLDFIELDS ACT, 1874	
See CUSTOMS	155		
EXECUTOR—			
See WILL	225		
Carrying on business. See ACCOUNTS ..	259, 304		
Effect of. Consent of. See SURETY	186		
EXAMINATION—			
Of insolvent. See INSOLVENCY ACT OF 1874 ..	294		
EXPLOSIVES—			
See NEGLIGENCE	119		
FEROCIOUS BULLOCK—			
See NEGLIGENCE	57		
FIELD WORK—			
See PACIFIC ISLANDER	73		
FINAL JUDGMENT—			
See PRACTICE	6, 181		
FLOATING SECURITY—			
See COMPANY	276		
FORECLOSURE—			
See COMPANY	276		
See REAL PROPERTY ACT OF 1861	83		
FOREIGN COMPANY—			
See CROWN LANDS ACT OF 1884	1		
See STAMP DUTY	55		
FOREIGN LIQUIDATOR—			
Personal property vesting in ..			
See CROWN LANDS ACT OF 1884	1		

	PAGE		PAGE
GUARANTEE—		Half the accountant's charges were allowed, but the costs of professional assistance were dis-	
<i>See</i> APPEAL	58	allowed.	
HUSBAND AND WIFE—		<i>Re</i> NEWMAN-WILSON, A PERSON OF UNSOUND MIND ..	314
<i>Evidence of. See</i> CRIMINAL LAW ..	302	INSOLVENCY—	
ILLEGAL SALE—		<i>Presentation of petition by committee of insane</i>	
<i>See</i> LICENSING ACT	197	<i>person. The court has power to sanction the</i>	
IMMORALITY—		<i>presentation of a petition in insolvency, or</i>	
<i>See</i> CONTRACT	268	<i>for the liquidation of the affairs of an insane</i>	
IMPLIED CONDITIONS—		<i>person by his committee.</i>	
<i>See</i> CONTRACT	268	<i>Re</i> NEWMAN-WILSON, A PERSON OF UNSOUND	
IMPOSSIBLE CONDITION—		MIND	229
<i>See</i> CONTRACT	256	<i>Wife's separate property in possession of husband.</i>	
IMPOUNDING ACT OF 1863 (27 VIC., No. 22)—		<i>Marriage settlement in England. The Married</i>	
<i>ss. 17, 38, 40. See</i> LOCAL GOVERNMENT ..	31	<i>Woman's Property Act, 1890 (54 Vic., No. 9),</i>	
<i>ss. 40, 52. Jurisdiction. Title to land. On a</i>		<i>s. 5. A wife who lent her husband separate</i>	
<i>complaint under s. 40 of 27 Vic., No. 22, jus-</i>		<i>property before the passing of The Married</i>	
<i>trices have jurisdiction to inquire whether</i>		<i>Woman's Property Act, 1890, is not to be</i>	
<i>defendant was in occupation of land on which</i>		<i>postponed in the proof of her debt in the</i>	
<i>cattle were alleged to have been trespassing,</i>		<i>estate of her husband, who has become insol-</i>	
<i>and to decide such incidental questions of</i>		<i>vent since that Act, until the other creditors</i>	
<i>title as are necessary for the determination of</i>		<i>are satisfied. S. 5 of 54 Vic., No. 9, is not</i>	
<i>that question.</i>		<i>retrospective. It applies in a case of liquida-</i>	
PHILLIPS v. DOWZER	210	<i>tion by arrangement as well as in insolvency.</i>	
<i>ss. 36, 39, 40. Trespass. Proceedings may be</i>		<i>Re</i> BROOMFIELD	176
<i>taken under s. 36 of The Impounding Act of</i>		<i>Of licensee. See</i> LICENSING ACT	95
<i>1863 against any person who impounds cattle</i>		INSOLVENCY ACT OF 1874 (38 VIC., No. 5)—	
<i>under circumstances under which he is not</i>		<i>ss. 5, 93 (7), 167 (2), r. 78. Certificate of Dis-</i>	
<i>justified in impounding them under the Act.</i>		<i>charge. Special resolution. Quorum of credi-</i>	
<i>Held, also (Real, J., dissenting), that the Act was</i>		<i>tors. S. was adjudicated insolvent. The</i>	
<i>intended to be a code of impounding law, and</i>		<i>proof of debt amounted to upwards of £1000.</i>	
<i>is not confined to a case of trespass where the</i>		<i>There were eighteen creditors in respect of debts</i>	
<i>ownership is undisputed.</i>		<i>over £10. At a meeting of creditors three</i>	
GOULD v. MCNAIRN	171	<i>attended, one being a creditor for £25,</i>	
INDECENT ASSAULT—		<i>another for £10 18s., and another for £3: the</i>	
<i>See</i> CRIMINAL LAW	151	<i>two first being represented by the insolvent's</i>	
INDEMNITY—		<i>solicitor as their proxy. The meeting unani-</i>	
<i>See</i> REAL PROPERTY ACT OF 1861	84	<i>mously passed resolutions that the insolvency</i>	
INEVITABLE ACCIDENT—		<i>had arisen from circumstances for which S.</i>	
<i>See</i> NEGLIGENCE	119	<i>could not justly be held responsible, and</i>	
INFANT—		<i>consented to his applying for his discharge before</i>	
<i>Liability of. See</i> RATES	206	<i>passing his last examination.</i>	
INJURIES TO PROPERTY ACT OF 1865 (29 VIC.,		Griffith, C.J., refused the certificate under s. 167	
No. 5)—		(2), being of opinion that a special resolution	
<i>s. 26. See</i> JUSTICES	153	<i>could not be passed at a meeting of creditors</i>	
INSANE DEFENDANT—		<i>at which less than three creditors for £10 and</i>	
<i>Leave to defend</i>	215	<i>upwards were present, the total number of</i>	
INSANITY—		<i>such creditors being more than three, and</i>	
<i>See</i> CRIMINAL LAW	219	<i>that the resolutions were not a bona fide</i>	
<i>See</i> INSOLVENCY	229	<i>declaration of the deliberate opinion of the</i>	
INSANITY ACT OF 1884 (48 VIC., No. 8)—		<i>creditors as to the cause of the insolvency,</i>	
<i>ss. 91, 158. Curator's judicial capacity. Profes-</i>		<i>and that he was not bound to act upon them.</i>	
<i>sional costs out of estates of insane persons.</i>		<i>Held, on appeal, by Harding, Cooper, and Real</i>	
<i>The Curator in Insanity will not be allowed</i>		<i>reversing Griffith, C.J., that the meeting was</i>	
<i>out of the estate of an insane person the costs</i>		<i>properly constituted; that the resolutions</i>	
<i>of professional assistance in preparing a report</i>		<i>could not be reviewed by the Court; and that</i>	
<i>under The Insanity Act of 1884.</i>		<i>the insolvent was entitled to his certificate of</i>	
<i>The lunatic was a partner in a firm of solicitors.</i>		<i>discharge.</i>	
<i>The partnership was dissolved by the court,</i>		<i>Re</i> Bennett (2 Q.L.J., 128), Re Coulson (6 Q.L.J., 8),	
<i>and it was referred to the Curator to take the</i>		<i>followed.</i>	
<i>accounts of the partnership. He employed,</i>		<i>An appeal from an application refusing a certi-</i>	
<i>with the approbation of the other partners, a</i>		<i>cate of discharge is not an ex parte applica-</i>	
<i>professional accountant to prepare a statement</i>		<i>tion within the meaning of s. 6 of 55 Vic.,</i>	
<i>of the accounts of the partnership, and also</i>		<i>No. 37, and notice must be given in the ordi-</i>	
<i>employed a solicitor to assist him in preparing</i>		<i>nary way.</i>	
<i>his certificate.</i>		<i>Re</i> STEPHENSON	32

- PAGE
- ss. 5, 73 (7), 167 (2). *Special resolution. Grant of certificate.*
- Held* (Griffith, C.J., *dissenting*), that a certificate must be granted under s. 167 (2) by the Court, on the unanimous resolution of a meeting of creditors, none of whom were creditors in respect of debts exceeding £10.
- Re MACKENZIE, INSOLVENT* 250
- ss. 40 *et seq.* *Debtor's petition. Debtor without the jurisdiction.* An adjudication will not be made on a debtor's petition when the debtor is not within the jurisdiction of the court.
- Re KLATTE* 275
- s. 47. *Creditor's petition. Good petitioning creditor. Legal and beneficial owners of a debt as petitioning creditors.* Where the legal and beneficial ownerships of a debt are in different persons, a petition for adjudication of the debtor as an insolvent can only be presented by both the owners, and not by either of them singly.
- In re Adams, Ex parte Cully* (9 Ch.D., 807) and *In re Hastings, Ex parte Dearle* (14 Q.B.D., 184) followed.
- Re ALFRED SHAW, Ex parte HUGHES* .. . 300
- ss. 47, 112, 113. *Petitioning creditor's debt. Assignment of interest in debt after act of insolvency. Act available for insolvency.*
- Held* (Griffith, C.J. *dissenting*) that the word "subsisting" in s. 47 of *The Insolvency Act of 1874* means only "existing," and that a creditor for £50 is a good petitioning creditor, although at the time of the act of insolvency the debts represented by that amount were due to several creditors, who could not collectively have presented a petition for adjudication.
- Held*, by Griffith, C.J., that an adjudication cannot be made upon an act of insolvency, unless when it was committed it was available for adjudication on the petition of the then existing creditors.
- Re BOWLER, Ex parte CALDWELL* .. . 242
- ss. 67, 202 (12). rr. 200, 201, 226. *Petitioning creditors costs.* A creditor making application for an order of adjudication under r. 200 of *The Insolvency Act of 1874*, or for an order under r. 201, to proceed with the insolvency, is, as regards his right to costs out of the estate, a petitioning creditor within the meaning of s. 67 of that Act.
- Re WATSON, INSOLVENT* 259
- ss. 90, 202, rr. 202, 203, 209, 227, 229, 234, 241. *Liquidation. Proof of debt. Powers of Registrar. Appointment of trustee.* The registrar has power to enquire into and to reject a proof of debt in liquidation proceedings.
- The functions of the Registrar with respect to objections to proof of debt in a resolution for liquidation are the same in Queensland under the Act of 1874 as in England under *The Bankruptcy Act of 1869*, unless a contrary intention is expressed under other rules therewith.
- The appointment of a trustee in liquidation by arrangement at a first meeting, need not be by special resolution.
- Re SHIELDS AND BECKETT, Ex parte R. T. SHIELDS* 115
- ss. 101 (4), 186, 193, 194, 195, rr. 186, 186. *Removal of a trustee in a liquidation by arrangement. The Insolvency, Intestacy, and Insanity Act of 1893 (57 Vic., No. 11), ss. 5, 7.* The court has jurisdiction to remove a trustee in a liquidation by arrangement upon sufficient cause shown.
- The Official Trustee in Insolvency reported to the court that S., a trustee in a liquidation by arrangement of the affairs of a debtor, had failed to comply with the provisions of the Acts and Rules as regards the furnishing of his accounts as such trustee. The report also showed that the trustee had neglected to consult his committee of inspection in his dealings with the debtor's property; that he had retained a large sum of money for more than a month after he had been directed by the committee of inspection to pay it into a bank named by them; and afterwards, when the money was not forthcoming, said it had been stolen, but had subsequently paid into the bank named by the committee of inspection the greater part of the money. On the application of a creditor, who was also one of the committee of inspection, S. was removed from his office of trustee, and ordered to pay the balance of the money to the Official Trustee without any deduction for his remuneration, and to pay the costs of the Official Trustee's report and of the creditor's application for removal.
- Rules 185 and 186 of the Insolvency Rules apply to a trustee in a liquidation by arrangement.
- Quære* whether s. 101, subsec. 4, of the Act impites to such a trustee.
- Re WM. JONES, A LIQUIDATING DEBTOR* .. 305
- ss. 101 (4), 152. *Removal of trustee. Good cause shown.* A trustee in the estate of a liquidating debtor was removed for failing to call a meeting to explain why a dividend had not been declared for six months, and for not taking possession of certain furniture allowed to the debtor, without which there was nothing to divide among the creditors.
- The meaning of the words "upon cause shown" in subsec. 4 of s. 101 explained.
- In re BLOCKSIDE* 143
- ss. 114, 116. *Examination of Insolvent. Insolvent committed to prison for refusing to answer to satisfaction of the court.* An insolvent on his examination before the court under s. 114, failed to answer to the satisfaction of the court questions relating to his disposal of moneys acknowledged to have been in the hands shortly before his insolvency, and was committed to prison under s. 116 for six months.
- Re GRACE INSOLVENT* 294
- s. 167 (2) r. 78. *Certificate of discharge. Special resolution. Office trustee. Proof of debt.* C. having been adjudicated insolvent, a meeting of creditors was held, at which one creditor was present in addition to the official trustees, who appeared in his capacity as trustee in two other estates. A special resolution was passed depressingly with the last examination of the insolvent, and that the insolvency had arisen from circumstances for which the insolvent could not justly be held responsible.

	PAGE		PAGE
<i>Held</i> , that the resolution was properly carried, that the court could not go behind it, and that the insolvent was entitled to his discharge.		<i>Held</i> , that the bank's right of action was a <i>chose in action</i> within the meaning of subsec. 6 of s. 5 of <i>The Judicature Act</i> , and that the plaintiffs were entitled to sue in their own names.	
<i>Re COULSON, AN INSOLVENT</i>	8	<i>VICTORIA INSURANCE COY. v. KING</i>	202
.. 193-195. <i>Liquidation. Release of trustee. Accounts.</i> 57 Vic., No. 15, ss. 6, 7. Since passing of 57 Vic., No. 15, a trustee of a liquidating debtor cannot obtain his release until the accounts have been audited, and the report of the Accountant in Insolvency has been filed and produced before the Registrar.		<i>Life Policy.</i>	
<i>In re HALL, LIQUIDATING DEBTOR</i>	179	<i>See LIFE INSURANCE ACT OF 1879</i>	294
.. 202 (10). <i>Discharge of liquidating debtor. Practice.</i> Both the trustee's report and the resolution granting the debtor's discharge must be filed on an application to the Registrar for the certificate of discharge of a liquidating debtor.		INTEREST—	
<i>Re J. D. SCOTT, LIQUIDATING DEBTOR</i>	119	<i>Claimed in special endorsement.</i>	
.. 202 (12) r. 202. <i>Creditors petition. Petition by debtor under s. 202 and 204 as an Act of Insolvency.</i> The filing by a debtor of a petition under ss. 202 and 204 of <i>The Insolvency Act of 1874</i> is an act of insolvency on which a creditor may present a petition for the adjudication of the debtor.		<i>See PRACTICE</i>	6, 181. 206
<i>Re GAYLARD, Ex parte PATERSON AND CO.</i>	303	INTERPLEADER—	
.. 202 (12) r. 200, s. 145 and 194. <i>Adjudication after petition under s. 202. Distraint.</i> S. 145 of <i>The Insolvency Act of 1874</i> does not apply to liquidation by arrangement. A "distraint" under <i>The Distress Replevin and Ejectment Act</i> is not a legal process under r. 194.		<i>See COSTS</i>	213
<i>Re WATSON, A LIQUIDATING DEBTOR</i>	208	INDICATURE ACT (40 VIC., No. 6)—	
.. 204, rr. 191, 216, form 93. <i>Notice of second meeting. Notice of meeting in Gazette.</i> Resolutions confirmed at a second meeting under s. 204 may be registered, notwithstanding that no notice of that meeting was inserted in the <i>Gazette</i> under 191.		s. 5 (6). <i>See INSURANCE</i>	202
<i>Re J. C. MARTIN</i>	303	s. 10. <i>See PRACTICE</i>	163
INSOLVENCY, INTESTACY, AND INSANITY ACT OF 1893, 57 VIC., No. 15—		JUDICIAL NOTICE—	
ss. 5 and 7. <i>See INSOLVENCY ACT OF 1874</i>	305	<i>See CRIMINAL LAW</i>	215
ss. 6 and 7	179	JURAT—	
INSUFFICIENT ASSETS—		<i>See PRACTICE</i>	286
<i>See COSTS</i>	30	JURISDICTION—	
INSURANCE—		<i>See CONSTITUTION</i>	234, 254
<i>Damages. Subrogation. Chose in action. Assignment of chose in action. Judicature Act (40 Vic., No. 6), s. 5, subsec. 6.</i> The plaintiff company insured certain wool belonging to the Bank of Australasia from Townsville to London. The wool was damaged through punts, the property of the Government, negligently running into the lighter on which the wool was being carried. The company paid the bank, believing they were bound to do so, and the bank assigned to the plaintiffs the cause and right of action which it had against the Government in respect of the collision and damage to the wool.		<i>See CRIMINAL LAW</i>	215
		<i>See GOLDFIELDS ACT, 1874</i>	232
		<i>See MANDAMUS</i>	95
		<i>See SMALL DEBTS COURT</i>	232
		<i>Debtor without. See INSOLVENCY ACT OF 1874</i>	275
		<i>Excess of. See JUSTICES</i>	166
		<i>Executrix without. See WILL</i>	154
		<i>Of justices. See JUSTICES</i>	153, 166
		<i>See IMPOUNDING ACT OF 1868</i>	210
		<i>Of licensing justices. See LICENSING ACT</i>	9, 76
		<i>Of Registrar. See ACCOUNTS</i>	219
		<i>Plaintiff without. See PRACTICE</i>	163
		JURY—	
		<i>See PRACTICE</i>	180
		JURORS—	
		<i>Challenge. Order to stand by. Proceedings in absence of jury.</i>	
		<i>See CRIMINAL LAW</i>	281
		JUSTICES—	
		<i>Disqualification. Certiorari.</i> Where a justice who has a personal interest in the subject matter of an action takes part in a decision, the decision cannot stand, and is liable to be quashed on <i>certiorari</i> .	
		<i>THE QUEEN v. MORRIS AND OTHERS</i>	9
		<i>Jurisdiction. Injuries to Property Act of 1865 (29 Vic., No. 5) s. 26. Bona fide claim of right. A bona fide claim of right to use land as a highway ousts the jurisdiction of justices on an information for a malicious injury to a fence erected across such land.</i>	
		<i>BLACK v. TURNER</i>	153
		<i>Liability of justices. Justices Act (50 Vic., No. 17) s. 252. Excess of jurisdiction. Proof of injury.</i> Justices are not liable to an action for an act done in a judicial proceeding, even if they exercise their jurisdiction in properly unless some injury has been done, and such injury must be alleged and proved. The liability of justices for acts done in excess of their jurisdiction, &c., discussed.	
		<i>RAVEN v. BURNETT</i>	166

	PAGE		PAGE
JUSTICES ACT OF 1886 (50 VIC., No. 17)—		Since 10th March, 1891, any such solicitor who has obtained the certificate of the Board of Examiners that he has passed the necessary examinations in Latin and French, is entitled to admission as a barrister.	
s. 226, 229. See APPEAL	196	Re POWERS	70
s. 252. See JUSTICES	186	Solicitor. Actual practice. Supreme Court Act of 1867 (31 Vic., No. 23), s. 40. Three years actual practice is a condition precedent to the right of a solicitor to be examined under s. 40 of The Supreme Court Act of 1867.	
ss. 209, 210. See CUSTOMS	155	A solicitor who acts as managing clerk for another solicitor is not in actual practice.	
ss. 4, 209. Meaning of "order" under s. 209. Quashing order. Person aggrieved. Power of attorney. Under s. 209 of The Justices Act of 1886, any persons feeling aggrieved by a conviction or order of justices may appeal to the Supreme Court by way of quashing order.		Re A. S. LILLEY	87
C., who was a licensed victualler under The Licensing Act of 1885, gave to G. & Co. (a registered company) a bill of mortgage and bill of sale over the stock-in-trade, etc., on his licensed premises, containing a power of attorney to G., a director of the company, authorising him to instruct a solicitor to make any application to a licensing authority necessary to be made under the Licensing Act. G. & Co. took possession of the licensed premises under their security, and on the following day G.'s solicitors, acting under the power of attorney, made an application in C.'s name to a police magistrate with regard to the license. The magistrate thereupon signed, as P.M., a document which, after reciting that it had been shown to him that C., the holder of a licensed victualler's license, had closed his licensed premises contrary to the provisions of the Licensing Act, that it was necessary that the business should be temporarily carried on, that G. & Co. were the owners of the premises and stock-in-trade, and that L., their agent, was a fit and proper person to hold a license, concluded in these words: "I certify that the said L. is hereby duly authorised to sell liquor under such license (C.'s license), subject to the provisions of the said Act, in like manner as if he had been the original licensee.		LEGISLATIVE ASSEMBLY—	
Held, that the application to the magistrate having been made by C.'s attorney, C. was not a person aggrieved within the meaning of the section.		Judicial power of. See CONSTITUTION ..	234, 254
Held, by Griffith, C.J., (Real, J., <i>dubitante</i>), that the document was not an order within the meaning of s. 209 of the Justices Act.		LIABILITY—	
CASTLEMAINE BREWERY & QUINLAN GRAY & Co., BRISBANE, LTD., v. COLLINGS, <i>Ex parte</i> COLLINGS	273	Of justices. See JUSTICES	166
KNOWLEDGE OF PLAINTIFF—		Of sheriff. See SHERIFF	175
See NEGLIGENCE	119	Of surety for principal. See SURETY ..	186, 289
LACHES—		LICENSING ACT OF 1885 (49 VIC., No. 18)—	
See REAL PROPERTY ACT OF 1861	270	ss. 6, 35. Packet license. Jurisdiction. Meaning of "City of Brisbane." <i>Certiorari</i> . A packet license was granted for s.s. Natone to ply in the Brisbane River by Mr. Yaldwyn, P.M., and Mr. Chancellor, sitting as the licensing authority of South Brisbane, the license having been previously refused by the licensing authority of North Brisbane. Subsequently, a transfer of the license was granted by certain of the licensing justices for south Brisbane.	
LAND BOARDS—		Held, by Griffith, C.J., and Harding, J. (Real, J. <i>dissentiente</i>), that the licensing justices of South Brisbane have no jurisdiction to grant packet licenses in respect of vessels plying within the port of Brisbane, for the words "the Police Magistrate or any two licensing justices within the city of Brisbane" in s. 35 of the Licensing Act, since the erection of the Municipality of South Brisbane, apply to the Police Magistrate who ordinarily exercises jurisdiction in the city of Brisbane.	
See CROWN LANDS ACT OF 1884	36	Held, also, that a rule <i>nisi</i> for a <i>certiorari</i> to bring up the certificate to be quashed should be made absolute.	
LEASE—		R. v. YALDWYN, R. v. CHANCELLOR AND OTHERS ..	76
See CROWN LANDS ACT OF 1884	234	ss. 33, 40, 41, 115, 124, 125 (3). Local option. Provisional certificate. Adjournment. Jurisdiction. On 5th March, 1889, the third resolution of the local option clauses of The Licensing Act was adopted, prohibiting the issue of new licenses within the Municipality of Charters Towers. On 14th March, 1893, A. gave notice of application for a provisional certificate for a house to be erected within the municipality, and published the prescribed notices. On 5th April A.'s application was adjourned to 3rd May. On 22nd April the resolution as to local option was rescinded, and on 3rd May a provisional certificate was granted to A. On 14th June, C. gave notice of application for a licensed victualler's license for the same premises. The license was ultimately granted to C., objections being overruled. L., a householder within the municipality, applied for a writ of <i>certiorari</i> , on the grounds that the justices had no juris-	
LEGAL AND BENEFICIAL OWNERS—			
Of a debt. See INSOLVENCY ACT OF 1874 ..	300		
LEGAL ESTATE—			
See WILL	183		
LEGAL PROFESSION—			
Admission of barrister. Supreme Court Act of 1867 (31 Vic., No. 23), s. 40. Classics. A solicitor who has been in actual practice for three years is entitled to be admitted as a barrister, on passing an examination in classics, under s. 40 of The Supreme Court Act of 1867.			

	PAGE		PAGE
diction either to adjourn or grant the application, and that M., one of the justices, was an interested party.		The justices found as a fact that the liquor was being carried for the purpose of delivery and not for sale, and dismissed the complaint.	
<i>Held</i> , by Cooper, J. (Chubb, J., <i>dissentiente</i>) that there was nothing in <i>The Licensing Act</i> to prevent the grant of a provisional certificate under the circumstances; that the justices had a discretion to adjourn the application of A., and that the license was properly granted to C.; that L. was not a "person aggrieved" and entitled to a writ of <i>certiorari</i> , and that the order <i>nisi</i> must be discharged, with costs.		<i>Held</i> , that they were right, and that they were not bound to find that the liquor was being carried for the purposes of sale, if in their opinion, the evidence pointed to a different conclusion.	
		M'MAHON v. DEUSNAP	199
		LICENSING VICTUALLER'S LICENSE—	
		See LICENSING ACT OF 1885	95
		LIEN—	
		Solicitor's. See COSTS	29
		LIEN TICKET—	
		See COMPANY	276
<i>Held</i> , on appeal, by Harding and Real, JJ. (Griffith, C.J., <i>dissenting</i>), that s. 124 only applies to the granting of certificates for licensed victuallers' and wine sellers' licenses, and does not prohibit provisional certificates being granted while the local option resolution is in force; that the justices had jurisdiction to grant the license; and that the rule must be discharged.		LIFE INSURANCE ACT OF 1879 (43 VIC., No. 8)—	
		Liability of policy moneys to payment of debts.	
		Disposal of policy moneys by will Testator by his will bequeathed all his real and personal estate whatsoever unto and to the use of C. and another, upon trust that they should sell, collect, and otherwise convert into money all such parts of the same premises as should not consist of money, and should, out of the moneys to arise from such sale, collection and conversion, and the money of which he should be possessed at his death, pay his funeral and testamentary expenses and debts, and should invest the residue of the moneys as thereafter provided. At the time of his death, testator was possessed of two insurance policies amounting to about £500. His estate was indebted to several creditors in sums exceeding that amount.	
<i>Per</i> Griffith, C.J.: That the prohibition to grant new licenses laid upon the licensing authority by the third resolution as to local option extended to the granting of provisional certificates; that as the bench had no authority to grant the provisional certificate on 5th April, they could not give themselves jurisdiction by adjournment to 3rd May; that M., one of the justices, was an interested party; and that rule should be made absolute on all grounds.		<i>Held</i> , that the creditors of the testator were legatees under the will, and were entitled as such to have the moneys arising from deceased's policies of insurance applied in payment of his debts.	
THE QUEEN v. MORRIS AND OTHERS	9	In re GOODERICH, ELLIOTT BROS. v. CAMPBELL	294
ss. 43, 55. Licensed victualler's license. Transfer. Mortgage. Insolvency of licensee. D., the lessee of premises licensed for the sale of liquor, sold the lease, license, and goodwill thereof to C., and as security for the purchase C. executed in D.'s favour a bill of sale over the lease, license, goodwill, and stock, which bill of sale contained an absolute P.A. to D. to sign transfers on behalf of C., and to apply for renewals of the license. D. signed a transfer of the license to S., and on the date the application was lodged, C. filed a petition for the liquidation of his affairs. C.'s trustee obtained a permit to carry on the business. The Licensing Bench refused to entertain the application for a transfer to S., as the transfer was made by D. and not by C.'s trustee.		LIMITATION OF TIME—	
<i>Held</i> , that a <i>mandamus</i> should issue to compel the justices to hear the application for the transfer.		See CRIMINAL LAW	61
R. v. LICENSING JUSTICES OF NORTH BRISBANE ..	95	LIQUIDATION—	
S. 111. Illegal Sale. Forfeiture. Liquor Act of 1886 (50 Vic., No. 30.) s. 7. Before making an order for the forfeiture of liquor under s. 111 of the Licensing Act, justices ought to be satisfied that it was kept for the purpose of being illegally sold.		By arrangement. See INSOLVENCY ACT OF 1874	
It is not unlawful for an unlicensed person to sell Queensland and made beer in quantities of two gallons and upwards.		LIQUIDATOR—	
M'MAHON v. PATERSON	197	Foreign. See CROWN LANDS ACT OF 1884 ..	1
S. 112. Sale and delivery of liquor. Burden of proof. Liquor had been sold by a grocer to a customer and was being delivered to the customer in a cart driven by defendant who was their servant. No evidence was given for the defendant.		LIQUOR ACT OF 1886 (50 VIC., No. 30)—	
		s. 7. See LICENSING ACT OF 1885	197
		LOADED ARM—	
		See CRIMINAL LAW	273
		LOCAL AUTHORITIES (JOINT ACTION) ACT OF 1886 (50 VIC., No. 16)—	
		s. 18. See CONTRACT	131
		LOCAL AUTHORITY—	
		Land vested in. See RATES	256
		LOCAL GOVERNMENT ACT OF 1878 (42 VIC., No. 8)—	
		s. 76	256
		s. 160. See CONTRACT	131
		ss. 199, 208. See RATES	206
		LOCAL GOVERNMENT—	
		By-law ultra vires. Local Government Act of 1878 (42 Vic., No. 8), ss. 167, 172. Impounding Act of 1863 (27 Vic., No. 22), ss. 17, 38, 40. A by-law that the owner of cattle straying on the roads within the boundaries of a shire council shall pay a sum of five shillings to the council by way of damage to the streets, is ultra vires.	
		VICTORSEN v. ITHACA SHIRE COUNCIL ..	31

<i>Prohibition. Recovery of rates. Disqualification of justices by interest. Auditor. Ratepayer.</i> (51 Vic. No. 7, ss. 116, 117). An auditor sued a ratepayer of the Cleveland Divisional Board who adjudicated on a complaint by the said board for the recovery of rates against it.	
<i>Held</i> , that both were disqualified by interest, and a writ of prohibition ordered to restrain proceedings on the judgment.	
RAVEN v. CLEVELAND DIVISIONAL BOARD ..	67
<i>Rates.</i> 54 Vic., No. 24, s. 48. 42 Vic., No. 8, s. 264. A complaint for the recovery of rates was made by the Town Clerk of the municipality of Sandgate.	
<i>Held</i> , that the complaint was rightly before the justices, and the order was upheld.	
S. 264 of <i>The Local Government Act</i> of 1878 is not impliedly repealed by s. 48 of <i>The Valuation and Rating Act</i> of 1890.	
MUNICIPALITY OF SANDGATE v. McLEOD ..	66
LOCAL OPTION—	
See LICENSING ACT.	9
MAINTENANCE—	
<i>Deserted wife. Evidence.</i> 4 Vic., No. 5, ss. 1 and 2. By sec. 2 of 4 Vic., No. 2, before an order for maintenance can be made against a man for deserting his wife it must be proved that the wife is without means of support.	
A mere offer by the husband to resume co-habitation is not sufficient to prevent the order being made.	
KELLY v. KELLY	72
MAGAZINE—	
See NEGLIGENCE	119
MANDAMUS—	
The jurisdiction of the court to grant a writ of <i>mandamus</i> is not ousted by the creation when a new and equally expeditious remedy is created.	
R. v. LICENSING JUSTICES OF NORTH BRISBANE	95
See ELECTIONS ACT OF 1884	88
MARRIAGE SETTLEMENT—	
See INSOLVENCY ACT OF 1874	176
MARRIED WOMAN—	
See WILL	28
See PRACTICE	208
MARRIED WOMAN'S PROPERTY ACT, 1890 (54 VIC., No. 9)—	
See REAL PROPERTY ACT OF 1861	68
ss. 5. See INSOLVENCY ACT OF 1874	176
MEMORANDUM OF TRANSFER—	
In blank. See REAL PROPERTY ACT OF 1861 ..	270
MINING—	
See GOLD FIELDS ACT OF 1874	98, 307
MONEY IN COURT—	
See COSTS	29
MORTGAGE—	
See CROWN LANDS ACT OF 1884	1
See LICENSING ACT	95
See REAL PROPERTY ACT OF 1861	83, 84, 270
NAVIGATION ACT OF 1867 (40 VIC., No. 3)—	
ss. 163, 180. See NEGLIGENCE	119

NEGLECT—

Ferocious bullock. Scienter. Cattle were being driven from a station to Charters Towers under the care of three drovers in the defendant's employment. When near the town, a bullock made a charge at a child, who escaped. A little further on, it became impossible to get the bullock along, and H. decided to shoot it. He borrowed a gun and fired at it twice. The bullock fell, but was not killed. It got up and ran towards the house of W., who, attracted by the noise of the gun, came out to see what was the matter. He was gored and knocked down by the bullock and injured. The bullock was subsequently shot.

Held, that there was evidence of knowledge that the animal was dangerous before the injury, and that as during that time the defendant's servants drove it through a populous town, F. did not take precautions for the protection of the public, the defendants were liable for negligence.

WILSON v. HARVEY & SONS 57

Navigation Act of 1867, s. 163, 180. Port Dues Revision Act of 1882 (46 Vic., No. 12), s. 12, Schedule 3. Bailment. Explosives magazine. Unfitness of locality. Inevitable accident. Unprecedented flood. Knowledge of plaintiff. Contributory negligence. Volenti non fit injuria. A quantity of explosives was stored in the Government magazine at Eagle Farm by B. & Co., merchants in Brisbane, in pursuance of *The Navigation Act* of 1867, for reward. There were no private magazines. In February, 1893, the Brisbane River was flooded twice, and the goods of B. & Co. were damaged. The floods were of an unprecedented nature. The second flood was higher than the first. No effort was made by the Government in the intervening period to remove or stack the goods higher. The goods were injured, and had to be destroyed. B. & Co. sued the Government under *The Claims against the Government Act*. The defence was an exercise of proper care; inevitable accident through an unprecedented flood; and that, if the locality was unsuitable, the plaintiffs knew and acquiesced therein.

The jury found (1): That the Government did not regard its duty, and that the goods were destroyed by their negligence in not providing, (a) a proper storehouse, (b) a proper locality, and (c) in not taking proper care. (2): That the loss was not occasioned by inevitable accident through an unprecedented flood. (3): That the rising of the river was not such that the Government could not, by any ability, have foreseen or guarded against it. (4): That the plaintiffs knew of the unfitness (a) of the storehouse, (b) of the locality: and with such knowledge, prior to and up to the grievance complained of, continued to deliver explosives, and undertake the risks. Damages were given for the full amount claimed.

Harding, J. held the maxim *volenti non fit injuria* was not applicable, and gave judgment for the plaintiffs.

Held, on appeal by Cooper, Chubb, and Real, J.J., that this judgment must be reversed.

Cooper, J. was of opinion that the Government were not responsible, except for a tortious interference with the goods, and that the question should have been raised by demurrer.

Chubb, J. was of opinion that the effect of *The Navigation Act* and *The Port Dues Revision Act* was to make the Government, in respect of explosives, an ordinary bailee for reward, and that they were bound to take ordinary and reasonable care of the goods deposited; that there was no evidence to support the finding that the floods of 1893 could have been foreseen; that the knowledge of the plaintiffs as to the unfitness of the storehouse and locality was an answer to their claim; that there was some evidence as to negligence to take proper care; that there should be a new trial for re-assessment of damages on the last ground.

Real, J., held there was evidence to support the findings, but that the knowledge of the plaintiffs was an answer to the unfitness of the storehouse and of the locality; that the Government were not bound to remove the goods unless in the interests of public safety; that there was evidence as to negligence in not re-stacking after the first flood; and that there should be a re-assessment of damages.

An order for a new trial with that object was granted.

BRABANT & Co. v. KING 119

NEW TRIAL—

See APPEAL 52, 58

See PRACTICE 131

NEW TRUSTEES—

See WILL .. : .. 183

NEXT FRIEND—

See COSTS 29

NOMINATION OF TRUSTEES—

See STAMP DUTY 55

NON-REGISTRATION—

See STAMP DUTY 55

NOTARY PUBLIC—

Attestation of. Power of attorney. Equity Act of 1867 (31 Vic., No. 18) s. 53. A power of attorney attested in England by a notary who signed his name and affixed his seal held to be sufficiently attested.

IN THE WILL AND CODICIL OF G. L. MATTHEWS 273

NOTICE—

Of appeal. See APPEAL 52

Of intention to apply for administration.

See ADMINISTRATION 273

ORDERS—

III., r. 6 181

XIV., 6, 208

XIV., r. 1A. 181, 206

XIX., r. 4A. 185

XXXV., rr. 3, 28 180

XXXIX., r. 10.. .. 131

XXI., r. 22 163

LIV., r. 1 58

LIV., r. 2 163

LVII., r. 6 6, 131

LVII., r. 11 163

(CROWN SIDE)

XXXI., r. 4 60

OUSTER—

See JUSTICES 153

OWNERSHIP—

Part ownership (19 Vic., No. 24) s. 10. Unlawful detinue of goods. Notice of claim. An order will not be made under 19 Vic., No. 24, s. 10, against a person for wrongfully detaining goods, in which he is a part owner, and there is no evidence of his having parted with his interest to the persons complaining.

Notice of the claim may be given on behalf of the claimant.

HALL v. LEYSHON & OTHERS, *Ex parte* HALL.. 232

PACIFIC ISLANDER—

Sugarcane. Field work. Driving along public road. 44 Vic., No. 17., s. 7. 47 Vic., No. 12, ss. 2, 10. The carriage of sugarcane in a cart along a highway from the field where it was grown to a railway station is not field work within the meaning of The Pacific Island Labourers Acts, 1880-1884, and any person employing a Pacific Islander for that purpose is liable to be convicted under s. 10 of the Act of 1884.

YOUNG v. SMYTH 73

PACIFIC ISLANDERS PROTECTION ACT, 1872

(35 and 36 VIC., c. 19)—

s. 9. See CRIMINAL LAW 215

PACIFIC ISLANDERS PROTECTION ACT OF 1875

(38 and 39 VIC., c. 51)—

s. 6. See CRIMINAL LAW 215

PACKET LICENSE—

See LICENSING ACT 76

PASS BOOK—

See BANKER AND CUSTOMER 262

PASSING ACCOUNTS—

See ACCOUNTS

PERSON DEPRIVED OF LAND—

See REAL PROPERTY ACT OF 1861 270

PERSON AGGRIEVED—

See JUSTICES ACT, 1886 273

PLEADING—

See PRACTICE 185

Amendment. See APPEAL 58

POLICY OF ASSURANCE—

See WILL 28

POLICY MONEYS—

See LIFE ASSURANCE ACT OF 1879 294

POSSESSION—

Of mortgagee. See CROWN LANDS ACT OF 1884 .. 1

PORT DUES ACT OF 1882 (46 VIC, No. 12), s. 12,

Schedule III—

See NEGLIGENCE 119

POST-DATED CHEQUE—

See BANKER AND CUSTOMER 262

POWER OF ATTORNEY—

See JUSTICES ACT, 1886 273

PRACTICE—

See CRIMINAL LAW 261

See COSTS 145, 227

Affidavit. Jurat. In an affidavit, sworn by several persons, and containing a separate jurat for each deponent, the first of the jurats was in order, and began, "Signed and sworn by the said," etc., but the second and each of the

following jurors did not contain the words "Signed and sworn," but began, "And by the said," etc.	PAGE
<i>Held</i> , that the jurat was sufficient.	
See JESSOP'S WILL	286
<i>Defence of person of unsound mind. Form of defence allowed by court.</i>	
In re NEWMAN-WILSON	215
<i>Evidence.</i>	
<i>Quære</i> , whether a map of the <i>locus in quo</i> , purporting to be drawn by a surveyor who is not called as a witness can be admitted in evidence if objected to.	
BLACK V. TURNER	153
<i>Evidence.</i>	
<i>Held</i> (Real, J., <i>dissentiente</i>), that where evidence has been wrongfully admitted, a conviction by justices will not necessarily be set aside on that ground if the court is of opinion that there is sufficient other evidence to support a conviction, and that the evidence wrongfully admitted did not influence the decision.	
IRVING V. GAGLIARDI	155
<i>Evidence in reply.</i> During the hearing of an action the plaintiff, in cross-examination, denied the truth of certain statements contained in evidence which had been taken on commission, and which was afterwards given for the defence.	
<i>Held</i> , that the plaintiff was entitled to give evidence on his own behalf in reply to defendant's case, notwithstanding that he had been so cross-examined.	
MULHOLLAND V. KING	268
<i>Evidence required of separate property of married woman on summons for final judgment under Order XIV.</i> The giving of a guarantee by a married woman for her husband's account at a bank is evidence of a representation to the bank by her of her having separate estate, and is therefore as against her <i>prima facie</i> evidence of her having such estate.	
BANK OF AUSTRALASIA V. HENRIETTA LEVY ..	208
<i>Order XXXV, rr. 3 and 28. Mode of trial. When jury necessary.</i> An order cannot be made under O. XXXV, r. 28, directing a trial without a jury, if the case is one in which a conflict of testimony is likely to arise.	
Q. I. AND L. M. CO. V. HART AND OTHERS ..	180
<i>Final judgment. O. III, r. 6. Order XIV, r. 1a. Specially endorsed writ. Interest.</i> A writ was endorsed for £358 5s. 9d. for principal and interest due under a covenant. The particulars (with dates) were: Principal sum, £300; interest under covenant at 9 per cent. to date of writ, £58 5s. 9d. Total, £358 5s. 9d. The plaintiff also claimed interest on £300 of the above sum from the date of writ to judgment.	
<i>Held</i> , that the claim for interest on £300 of the above sum was not a special endorsement under O. III, r. 6, and summons for final judgment dismissed.	
NORTH QUEENSLAND MORTGAGE AND INVESTMENT Co. v. McDONALD	181

O. XXXIX, r. 10. O. LVII, r. 6. <i>Reversal of judgment.</i> Where there are several defendants represented by separate counsel, having practically the same defence, only one address to the jury will be allowed.	PAGE
When practically the same evidence would be given at a new trial, the court has power to set aside the findings of the jury, and enter judgment under O. XXXIV, r. 10, for the successful party.	
CLARK & FAUSET V. MUNICIPALITY OF BRISBANE AND ANOTHER	131
<i>Pleading. Money repayable on demand. Condition precedent.</i> O. XIX, r. 40. To a claim for money lent, repayable on demand, it was objected on demurrer that there was no allegation of demand in the statement of claim.	
<i>Held</i> , as there was a general averment of the performance of all conditions precedent, the demurrer must be overruled.	
FRIEMUND V. SPANN	185
<i>Security for costs. New trial.</i> O. LIV, l. It is not the practice of the court to require security for costs on an application for a new trial, except under very exceptional circumstances.	
UNION BANK OF AUSTRALIA, LTD., v. RAINE ..	58
<i>Security for costs. Return of plaintiff to jurisdiction. Power to vary an order. Judicature Act (40 Vic., No. 6), s. 10. O. XLI, r. 22. O. LIV, r. 2. O. LVII, r. 11.</i>	
<i>Held</i> , also, that where an order is made after hearing both sides, that it is a general rule that the court which made the order cannot reverse or vary it.	
An order was made by Real, J., that the plaintiff being out of the jurisdiction should give security for costs. The plaintiff returned, stated he had no present intention of leaving the colony, and took out a summons to discharge the order.	
<i>Held</i> , that the plaintiff was entitled to be released from the operation of the order.	
WOODS V. SHERIFF OF QUEENSLAND	163
<i>Specially endorsed writ. O. XIV, r. 1a. Interest.</i> A special endorsement claiming interest must show that the interest is payable either by law, or by a contract between the parties, on the sum in respect of which it is claimed.	
A claim on a <i>quantum meruit</i> may be made the subject of a special endorsement.	
A writ of summons was endorsed with a claim for £55 10s., for board and lodging and money lent, and for £45 10s. on a promissory note, and £16 2s. 6d. interest therein from date of writ till judgment. There was also a claim for interest at 8 per cent on £45 10s., part of the above sum "until judgment."	
<i>Held</i> , overruling the decision of Chubb, J., that the endorsement was sufficient.	
WHITE V. RUSSELL	206
<i>Specially endorsed writ. O. XIV. Interest. Promissory note. Bills of Exchange Act (48 Vic., No. 10) s. 58. Final judgment. Re-hearing. Affidavit. O. LVII, r. 6. Costs.</i> The endorsement upon a writ of summons in an action upon a promissory note, contained a claim for interest without stating any rate or authority for the same.	

Held, that the writ was specially endorsed within O. III., r. 6, and that the endorsement need not contain a statement that interest was claimed by law, on account of s. 58 of *The Bills of Exchange Act*, whereby interest is to be deemed liquidated damages. On the rehearing of an order for final judgment, further affidavits may be read by the appellant as of right, but the appellant, even though successful, will have to pay the costs of the appeal.

SANDS, McDougall & Co., v. NIRD, 18 V.L.R., 673, dissented from.

ARIDA v. SID 6

Writ. Special endorsement. Promissory note payable on demand. Amendment of writ. In an action on a promissory note payable on demand, the demand was not alleged in the endorsement, but it appeared upon the evidence that a demand had been made.

Leave was granted on the hearing of a summons for final judgment to amend the writ by alleging a demand.

QUEENSLAND BREWERY, LTD., v. CAMPBELL .. 286

Transfer of works from Southern to Northern Court. Form of order. On an application to a judge at Brisbane to send matter for hearing before a Northern judge, it should be shown that the Northern judge has been consulted as to a date convenient to him for the hearing.

The ordering fixing the hearing of any such matter contain a request to the Northern judge to hear the matter.

Re GRACE, INSOLVENT 286

PRINCIPAL AND SURETY—

See SURETY 186, 289

PRIOR WILL—

See WILL 278

PRIORITY—

Of costs. See COSTS 30

Of gift. See REAL PROPERTY ACT OF 1861 .. 68

PROBATE—

See WILL 28

PROBATE ACT OF 1867 (31 VIC., No. 9)—

s. 6. See ACCOUNTS 219

s. 32. See WILL 225

PROHIBITION—

See COSTS 67

See LOCAL GOVERNMENT 67

PROMISSORY NOTE—

Interest on. See PRACTICE 6

Payable on demand. See PRACTICE 286

PROOF OF INJURY—

See JUSTICES 166

PROSECUTION—

Commencement of. See CRIMINAL LAW 61

PROVISIONAL CERTIFICATE—

See LICENSING ACT 9

QUASHING ORDER—

See COSTS 165

See JUSTICES ACT, 1886 273

RAPE—

See CRIMINAL LAW 151

RATES—

See LOCAL GOVERNMENT ACT 66, 67

Rateable land. Exemption from rates. Land vested in local authority. Local Government Act of 1878 (42 Vic., No. 8), s. 76. Valuation and Rating Act of 1890 (54 Vic., No. 54) s. 11. The Municipality of R., being the registered proprietors of certain land, demised it to the defendant for 21 years at a fixed rent. The lease contained, *inter alia*, a covenant in these words: "The said demised premises shall be liable to be rated and assessed in the same manner as if the said premises were not the property of the said Municipality." The Municipality sued the defendant for rates.

Held, that the land was "vested in the Municipality within the meaning of s. 176 of *The Local Government Act of 1878*, and s. 11 of *The Valuation and Rating Act of 1890*, notwithstanding that it was in the possession of the defendant.

Held, also, that the exemptions from rating contained in those Acts are not conditions for the benefit of individuals, but limitations of the statutory authority of the local authority. Such authority cannot be conferred by agreement *inter partes*.

Held, further, that reading the covenant as a covenant to pay a sum to be assessed in the form of rates in respect of the property, the provisions of the Local Government Acts allowing an appeal from assessments to legal tribunals could not be applied to land not rateable under the Acts; and that the conditions of assessment being consequently impossible of complete fulfilment, the covenant was invalid.

MUNICIPALITY OF ROCKHAMPTON v. INGHAM .. 256

Valuation and Rating Act of 1890 (54 Vic., No. 24) ss. 5, 47, 48. Local Government Act of 1878 (42 Vic., No. 8), ss. 199, 208. Liability of infant. An infant who becomes the registered proprietor of land, is liable for all rates levied on such land, including rates due at the time of purchase.

MUNICIPALITY OF GLADSTONE v. O'NEILL .. 206

RATEPAYER—

See LOCAL GOVERNMENT 67

REAL PROPERTY ACT OF 1861 (25 VIC., No. 14)—

ss. 48, 126, 127. *Assurance fund. Person deprived of land. Fraud. Mortgagee. Bona fides. Laches. Memorandum of transfer in blank.* G., the registered proprietor of an estate in fee simple of land under the Real Property Acts, borrowed money from L., and purported to sign a receipt for the same, whereas he, in fact, signed a memorandum of transfer in blank of the land, which was to be the security for the loan. On offering to pay back the loan, it was discovered that L. had lodged the certificate of title and memorandum of transfer with the E.S. and A. Bank. The name of the vendor, consideration and attestation clause were afterwards inserted by L. before the document was brought to the bank. L. affixed his signature on the memorandum of

	PAGE		PAGE
transfer in the presence of the bank's officials. The bank made no inquiries as to L.'s authority to fill in the blanks. A certificate was issued in L.'s name and pledged with the bank.		ss. 77, 82. See STAMP DUTY	55
<i>Held</i> , that G. had been deprived of the land by fraud, but that he allowed L. to remain in possession of the documents, and by so doing induced the defendant to believe that L. was entitled to deal with the land.		RECOVERY OF LAND—	
<i>Held</i> , also, that he was not entitled to recover from the assurance fund, as the bank by making inquiries ought to have discovered the fraud, and could not sustain their title as against the plaintiff.		See CROWN LANDS ACT OF 1884	1
<i>Semble</i> . A memorandum of transfer in blank is absolutely void.		REGISTRAR—	
GILBERT v. BOURNE	270	See INSOLVENCY ACT OF 1874	115
<i>Mortgage. Default. Foreclosure. Registration.</i> On a motion for judgment foreclosure in default of the payment of money secured by a mortgage of lands under <i>The Real Property Act</i> , a declaration will not be made that, in case of default in payment within a certain time of the amount certified by the Registrar, the plaintiff is entitled to be registered as the proprietor of the mortgaged lands.		Duty on passing accounts. See ACCOUNTS 219, 260	
BRITISH AND AUSTRALASIAN TRUST AND LOAN CO. v. SOUTH QUEENSLAND PASTORAL CO. ..	83	REGISTRATION—	
ss. 43, 48, 99. <i>Real Property Act of 1877</i> (41 Vic., No. 18), ss. 12, 44, 47, 49. <i>Memorandum of transfer. Caveat. Registration. Will. Priority of gift.</i> S., being the registered proprietor of lands under <i>The Real Property Act</i> , devised the said lands to the Queensland Trustees, Ltd., upon certain trusts. Some time afterwards he executed a memorandum of transfer without consideration in favour of his son in the form required by the Act. That document remained in a drawer in testator's house, and was not registered. The will was not revoked, and on the day of his death the transfer was lodged in the Real Property Office.		See REAL PROPERTY ACT OF 1861	68, 83
Before the transfer was registered, the Queensland Trustees, Ltd., ordered a caveat to be lodged forbidding the registration of the transfer. A summons to remove the caveat was dismissed, on the ground that the will, being unrevoked, spoke from the death of the testator, and the gift not being registered was incomplete, and the Queensland Trustees, Ltd., were held to be entitled to registration in priority to S.'s son.		Of bill of sale. See BILL OF SALE ACT OF 1891	182, 305
Re SKINNER	68	RE-HEARING—	
s. 68. <i>Mortgage. Transfer. Covenant. Indemnity. Form of judgment.</i> The purchaser of land, subject to a bill of mortgage, registered under the Real Property Act, is by s. 68 of <i>The Real Property Act of 1861</i> , under an implied covenant to indemnify the mortgagor against claims for interest by the mortgagee, and a declaration for indemnity, and an order for payments of the amount claimed, will be made against the transferee, although no money has been paid by the mortgagor, or by another person jointly and severally liable under the mortgage.		See PRACTICE	6
Form of judgment in such case.		RELEASE—	
STANLEY v. WISEMAN	84	Of one of two joint debtors. See SURETY ..	289
		Of surety. See SURETY	186
		Of trustee. See INSOLVENCY	179
		RELIGIOUS, EDUCATIONAL, AND CHARITABLE INSTITUTIONS ACT OF 1861 (25 VIC., No. 19)—	
		s. 1, 8. See WILL	44
		REMOVAL—	
		Of trustee in insolvency. See INSOLVENCY ACT OF 1871	305
		RENEWAL—	
		Of bills of sale. See BILLS OF SALE ACT OF 1891	182, 305
		RENUNCIATION—	
		See WILL	225
		RENT—	
		See CROWN LANDS ACT OF 1884	234
		REPRESENTATIONS—	
		By persons arrested. See SHERIFF	175
		RESCISSION—	
		See CONTRACT	131
		Of appointment as administrator. See ADMINISTRATION	27
		RESIDENCE AREA—	
		See GOLD FIELDS ACT, 1874	232
		See SMALL DEBTS COURT	232
		RESPITE OF SENTENCE—	
		See CRIMINAL LAW	145
		REVERSAL OF JUDGMENT—	
		See PRACTICE	131
		ROYAL MINE—	
		See GOLD FIELDS ACT, 1874	98
		SALE OF GOODS—	
		See CONTRACT	131
		SALE AND DELIVERY—	
		Of liquor. See LICENSING ACT	199
		SCIENTER—	
		See NEGLIGENCE	57
		SECURITY FOR COSTS—	
		See APPEAL	58
		See PRACTICE	163

	PAGE		PAGE
SEPARATE ESTATE—		25 Vic., No. 14, ss. 48, 126, 127	270
<i>See</i> INSOLVENCY	176	25 Vic., No. 14, ss. 77, 82	55
<i>See</i> WILL	28	25 Vic., No. 14, s. 68	84
<i>Proof of. See PRACTICE</i>	208	25 Vic., No. 19, ss. 1, 8	44
SET OFF—		27 Vic., No. 4, s. 25	112
<i>See</i> APPEAL	52	27 Vic., No. 4, s. 108	30
<i>Bankers right of. See BANKER v. CUSTOMER</i>	262	27 Vic., No. 22, ss. 17, 38, 40	31
SHERIFF—		27 Vic., No. 22, ss. 36, 89, 40	171
<i>Wrongful arrest. Representations of person arrested.</i>		27 Vic., No. 22, ss. 40, 52	210
<i>Estoppel. Liability of sheriff. Detention.</i>		29 Vic., No. 5, s. 26	153
<i>Reasonable time for inquiry. A writ of <i>capias</i></i>		29 Vic., No. 6, s. 76	146
<i>ad respondendum</i> was issued for the arrest of		29 Vic., No. 11, s. 15, 16	272
Alfred Woods. The plaintiff, his brother, on		29 Vic., No. 13, ss. 48, 51	60
being asked whether he was Alfred Woods,		29 Vic., No. 15, s. 36	86
answered in the affirmative. He was then		30 Vic., No. 14, s. 27	55
arrested, but after his arrest he told the sheriff		31 Vic., No. 9, s. 6	219
he was not the person mentioned in the writ		31 Vic., No. 9, s. 32	225
of <i>capias</i> , but declined to say who he was.		31 Vic., No. 13, s. 64	63
The sheriff then caused inquiries to be made,		31 Vic., No. 18, s. 53	273
and the plaintiff was subsequently discharged.		31 Vic., No. 19, s. 29	260
<i>Held</i> (affirming the decision of Real, J.), that the		31 Vic., No. 23, s. 40	70, 87
plaintiff having represented himself to be		31 Vic., No. 23, s. 23	219
Alfred Woods was stopped from complaining		31 Vic., No. 23, s. 58	36
of the arrest.		31 Vic., No. 38, s. 8	234
<i>Held</i> , further, that under the circumstances the		36 Vic., No. 8, s. 1	145
sheriff was justified in detaining him for a		37 Vic., No. 1, s. 215	155
reasonable time, in order to make inquiries as		37 Vic., No. 1, s. 237	200
to his indentify, and as it was not found that		38 Vic., No. 5, ss. 5, 93 (7), 167 (2)	82, 250
the plaintiff was detained for an unreasonable		38 Vic., No. 5, s. 40	275
time during such inquiry, judgment must be		38 Vic., No. 5, s. 47	300
entered for the defendant.		38 Vic., No. 5, ss. 47, 112, 113	242
<i>WOODS v. SHERIFF OF QUEENSLAND</i>	175	38 Vic., No. 5, ss. 67, 202 (12)	259
SMALL DEBTS COURT—		38 Vic., No. 5, ss. 90, 202	115
<i>Judgment of. See APPEAL</i>	52	38 Vic., No. 5, ss. 101 (4), 136, 193, 194, 195	305
<i>Jurisdiction. A Small Debts Court has jurisdiction</i>		38 Vic., No. 5, ss. 101 (4), 152	143
to hear a complaint for the balance of money		38 Vic., No. 5, ss. 114, 116	294
due on the sale of residence area on a gold		38 Vic., No. 5, s. 167 (21)	8
field.		38 Vic., No. 5, ss. 193, 194, 195	179
<i>LEE GOW v. WILLIAMS, Ex parte WILLIAMS</i>	232	38 Vic., No. 5, s. 202 (10)	118
SOLICITORS ACT OF 1891 (55 VIC., No. 22)—		38 Vic., No. 5, s. 202 (12), 145	208
s. 3. <i>See COSTS</i>	200	38 Vic., No. 5, s. 202, 204	303
SOLICITOR—		38 Vic., No. 11	276
<i>See</i> LEGAL PROFESSION	87	38 Vic., No. 11, ss. 2, 10, 14	98
SOLICITOR AND CLIENT—		38 Vic., No. 11, ss. 32, 67	232
<i>See</i> COSTS	227	38 Vic., No. 11, s. 74	307
SOLICITOR'S LIEN—		40 Vic., No. 6, s. 5 (6)	202
<i>See</i> COSTS	29	40 Vic., No. 6, s. 10	163
SPECIAL CASE—		41 Vic., No. 3, s. 163, 180	119
<i>See</i> APPEAL	196	41 Vic., No. 18, ss. 12, 32, 47-49	68
<i>See</i> COSTS	95	42 Vic., No. 8, s. 76	254
SPECIAL ENDORSEMENT—		42 Vic., No. 8, s. 160	131
<i>See</i> PRACTICE	6, 181, 206, 286	42 Vic., No. 8, ss. 167, 172	30
SPECIAL RESOLUTION—		42 Vic., No. 8, ss. 199, 208	206
<i>See</i> INSOLVENCY ACT OF 1874	250		
SUBROGATION—			
<i>See</i> INSURANCE	202		
STATUTES—			
4 Vic., No. 5, ss. 1, 2	72		
19 Vic., No. 24, s. 10	282		
20 Vic., No. 3, s. 1	86		
25 Vic., No. 13	219		
25 Vic., No. 14, ss. 43, 48, 99	68		

	PAGE
42 Vic., No. 8, s. 264	66
43 Vic., No. 8... ..	294
44 Vic., No. 17, s. 7	73
46 Vic., No. 12, s. 12	119
47 Vic., No. 12, s. 2, 10	73
48 Vic., No. 8, s. 91, 158	314
48 Vic., No. 10, ss. 3, 4, 11, 12, 13, 14, 74 ..	262
48 Vic., No. 10, s. 58.. ..	6
48 Vic., No. 28, ss. 21, 30 (5)	234
48 Vic., No. 28, ss. 17, 18, 21	36
48 Vic., No. 28, ss. 43, 65, 67	1
49 Vic., No. 13, ss. 6, 28, 31, 33	88
49 Vic., No. 18, ss. 6, 35	77
49 Vic., No. 18, ss. 33, 40, 41, 115, 124, 125 (3) ..	9
49 Vic., No. 18, s. 43, 55	95
49 Vic., No. 18, s. 111	197
49 Vic., No. 18, s. 112	199
50 Vic., No. 16, s. 18.. ..	131
50 Vic., No. 17, ss. 4, 209	273
50 Vic., No. 17, ss. 209, 210	155
50 Vic., No. 17, ss. 226, 229.. ..	196
50 Vic., No. 17, s. 252	166
50 Vic., No. 30, s. 7	197
50 Vic., No. 31, ss. 7, 12, 13.. ..	1
50 Vic., No. 31, s. 10.. ..	55
51 Vic., No. 7, ss. 116, 119	67
52 Vic., No. 5, ss. 3, 8	155
54 Vic., No. 5	145
54 Vic., No. 5, s. 1	146
54 Vic., No. 9, ss. 3, 7, 8, 14	28
54 Vic., No. 9, s. 5	176
54 Vic., No. 24, s. 48.. ..	66
54 Vic., No. 24, ss. 5, 47, 48	206
54 Vic., No. 24, s. 11	256
55 Vic., No. 22, s. 3	200
55 Vic., No. 23, ss. 3, 8, 9, 10, 17	182
55 Vic., No. 23, s. 17	305
55 Vic., No. 24, ss. 3, 4, 10	151
55 Vic., No. 24, s. 4	60
55 Vic., No. 33, ss. 120-123	213
55 Vic., No. 33, ss. 132, 144, 145, 147 ..	52
55 Vic., No. 37, s. 6	32
56 Vic., No. 7, s. 3	88
56 Vic., No. 26, s. 10	307
57 Vic., No. 1	209
57 Vic., No. 15, ss. 6, 7	179
57 Vic., No. 15, ss. 5, 7	305
58 Vic., No. 23, ss. 2, 10	224
58 Vic., No. 23, s. 10	283
STATUTES (IMPERIAL)—	
35 and 36 Vic., c. 19, s. 9	215
38 and 39 Vic., c. 51, s. 6	215

STAMP DUTY—

Foreign Company. Non-registration. British Companies Act of 1886 (50 Vic., No. 31). Real Property Act of 1861 (23 Vic., No. 14) ss. 77, 82. Nomination of trustees. Stamp Duties Act of 1866 (30 Vic., No. 14), s. 27. Agreement Conveyance. A document in the form of a nomination of trustees from T. E. White and Alfred Shaw (to T. E. White and Alfred Shaw), as trustees under *The Real Property Act* for Alfred Shaw & Coy., Ltd., was tendered to the commissioners to fix the duty payable. The transferors and transferees were identical. The commissioners considered it a conveyance and demanded duty accordingly, while the trustees claimed it was liable to nominal duty only as an agreement.

Held, that the instrument was in law invalid as a transfer, and did not require stamp duty, but it could not be registered as a transfer without payment of stamp duty.

Re THE TRUSTS OF ALFRED SHAW & Co. 55

STAMP DUTIES ACT OF 1866 (30 VIC., No. 14)—

s. 27. *See* STAMP DUTY 55

STANDING ORDERS—

See CONSTITUTION 234, 254

SUBROGATION—

See INSURANCE 202

SUBSCRIPTIONS—

To local matters by executors carrying on business.

See ACCOUNTS 304

SUCCESSFUL LITIGANTS—

See COSTS 30

SUCCESSFUL PARTY—

See CROWN LANDS ACT OF 1884 36

SUGARCANE—

See PACIFIC ISLANDER 73

SUPREME COURT ACT OF 1867 (31 VIC., No. 23)—

s. 23. *See* ACCOUNTS 219

s. 40. *See* LEGAL PROFESSION 70, 87

s. 58. *See* CROWN LANDS ACT OF 1884 36

SURCHARGE—

See ACCOUNTS 219

SURETIES—

Joint and several covenants. Release of one of two joint debtors. Liability of remaining debtor as principal debtor and as surety. A transfer and charge executed by M. and G. over a piece of land in favour of plaintiffs, contained joint and several covenants by M. and G. for the repayment, at a fixed date, of £10,000, with interest. Shortly after the execution of the transfer and charge, M. and G. transferred their equity of redemption in the land to third parties. M. and G. having died, and default having been made, plaintiffs sued G.'s executors, in the Supreme Court of Victoria, for the whole amount due under the covenants. The executors denied all liability, and resisted the claim, and it was finally agreed that plaintiffs should receive £750, and £19 16s. costs, in full satisfaction of their claim against G.'s estate in respect of the charge. The executors

agreed on their part to transfer all their estate and interest in the transfer and charge and in the land to plaintiffs. Instruments to that effect were executed and interchanged between the parties. The plaintiffs in the release given to G.'s executors, specially reserved their rights under the covenants against M. The plaintiffs then sued M.'s executors for the whole amount due under M.'s covenants.

Held, that the release given by the company to G.'s executors operated as a release of M.'s liability for half of the debt for which as between himself and G. he was surety for G., but did not release M. from his liability as a principal debtor for the other half of the amount due under the covenant.

SOUTH AUSTRALIAN AND LAND MORTGAGE CO., LTD.
v. M'INNES 289

Principal and surety. Release of surety by giving time to principal debtor. Consideration for agreement to give time. Consent of executors. Effect of subsequent promise or assent of executors. Collateral printed and written covenants differing in terms with respect to the same matter. Covenant to repay joint and several future debts. Liability of sureties estate for advances made to principal after his death. Collateral printed and written contracts.

White and defendant Robinson having been in partnership as sugar planters for a term of years, agreed before the expiration of the term that Robinson should take over the assets and discharge the liabilities of the firm, and pay White £5600 for his share, and that, to enable him to make these payments, £7000 should be borrowed on the partnership property by both partners. White and Robinson accordingly obtained an advance of this sum from plaintiffs on the security of a bill of mortgage under *The Real Property Act*, and of a bill of sale, both of which were executed by both White and Robinson, and dated 21st June, 1880. The bill of mortgage, which was in print, contained a joint and several covenant to repay the advance of £7000 on 7th June, 1885, with interest at 8 per cent., and also all further advances that might be made by the plaintiffs to White and Robinson, or either of them. The bill of sale, which referred to the bill of mortgage, was in writing. The covenant for repayment in it, covered only advances made to the mortgagors jointly.

On the day following the execution of the securities, White and Robinson executed a deed of dissolution of partnership containing covenants by Robinson to indemnify White against the £7000 secured by the mortgage, and the other partnership debts.

It did not appear that at the date of the securities plaintiffs were aware of the arrangements for dissolution, or that as between White and Robinson the former was intended to be a surety only. It was found as a fact that that relation existed at the date of the securities, and that plaintiffs became aware of it before any of the other transactions in question in the action.

White died in December, 1884, having appointed defendants his executors. They all proved the will. The defendant Hart was, during all material times, a local director of the plaintiff company.

In February, 1885, before the £7000 fell due, Robinson applied in writing to the plaintiffs for a renewal of the mortgage, describing it as "my mortgage falling due in June next," and asking that it might be renewed for three or five years "in my own name instead of White and Robinson." Plaintiffs replied that their board had sanctioned "the renewal applied for for a term of three years. No fresh mortgage was executed, and no change was made in plaintiff's books. Defendant Barker was not aware of this negotiation.

Held, that those letters established a novation of contract, by which plaintiffs accepted Robinson as their sole debtor, and that Robinson was the agent of the executors for the purpose of the entering into the contract.

Held, further, that the letters constituted a binding agreement by plaintiffs to give further time to Robinson for payment of the debt, and that the liability of White's executors as sureties was thereby discharged, the extension of time not being made with their actual consent.

A promise to pay interest on a mortgage debt for a further period, and not to exercise the right of redemption, is a good consideration for a promise to extend the time for repayment.

The consent of Hart as one of the plaintiffs' local directors, and of Robinson, *held* not to operate as an assent by White's executors to the extension so as to bind his estate; because (1) they did not intend in so consenting to act in the capacity of executors; and (2) consent of defendant Barker, the remaining executor, was not obtained.

In 1887 plaintiffs claimed the £7000 from defendants as White's executors, and they wrote in reply a letter which in effect admitted their liability.

Held, that executors cannot by a promise made without consideration revive a debt to which the testator's estate had been liable as a surety, and which had been discharged by giving an extension of time under a binding agreement to the principal debtor.

(*Mayhew v. Crickett*, 2 Sw., 185; *Smith v. Winter*, 4 M. and W., 467, considered.)

It appeared that when the letter was written defendants believed that White's estate was liable for the debt.

Held, that the agreement or assent to be inferred from the letter having been given under a *bona fide* mistake of law would not in any event have been binding on them as executors.

After notice to plaintiffs of the dissolution of partnership between White and Robinson, and of the existence of the relationship of principal and surety between them, the plaintiffs advanced a sum of £1500 to Robinson on the security of a lien on the crops on the estate comprised in the bill of mortgage. In the two following years (after White's death) fresh liens were given by Robinson to plaintiffs to secure the same sum.

Held, 1. That the advance being made after notice of the dissolution and suretyship, was not advance within the meaning of the contract between the parties as evidence by the bill of mortgage and bill of sale read together

2. That the advance having been made by plaintiffs on Robinson's credit alone was not within the terms of the covenant in the bill of mortgage.

3. That even if White was liable for the advance of £1500, that liability, being a liability of suretyship, was discharged by the renewal of the lien, which operated either by way of accord or satisfaction or as an agreement to give time to the principal debtor.

4. That the liability under the renewed liens given by Robinson after White's death was not within the covenant in the bill of mortgage.

Effect of collateral printed and written securities considered.

QUEENSLAND INVESTMENT AND LAND MORTGAGE COMPANY, LTD., v. HART AND OTHERS 186

SURETIES—

See WILL 155

TAXATION—

See COSTS 227

TESTAMENTARY CAPACITY—

See WILL 278

TIME—

Limitation of. See CRIMINAL LAW 60

TITLE TO LAND—

See IMPOUNDING ACT OF 1863 210

TRANSFER—

See REAL PROPERTY ACT OF 1861 68, 84, 270

See LICENSING ACT 95

Of work from Southern to Northern court.

See PRACTICE 286

TRESPASS—

See GOLD FIELDS ACT, 1874 98

See IMPOUNDING ACT OF 1863 171

TRUSTEES AND INCAPACITATED PERSONS

ACT OF 1867 (31 VIC., No. 19)—

s. 29. *Vesting Order. Entitling of documents in application.*

Held, that an application under s. 29 of The Trustees and Incapacitated Persons Act of 1867 for the transfer of stock of a lunatic trustee or mortgagee need not be entitled in the matter of the lunatic.

IN re MCCOLLIN'S TRUSTEES 260

ULTRA VIRES—

See LOCAL GOVERNMENT 31

UNION TRUSTEE COMPANY OF AUSTRALIA LIMITED ACT (54 VIC.)—

s. 13. See ADMINISTRATION 27

UNTRUE REPRESENTATION—

See CRIMINAL LAW 68

VALUATION—

See CUSTOMS 155

See CROWN LANDS ACT OF 1894 234

VALUATION AND RATING ACT OF 1890 (54 VIC.; No. 24)—

s. 11. See RATES 256

ss. 5, 47, 48. See RATES 206

VARYING OR RESCINDING ORDERS—

See PRACTICE 163

VESTING ORDER—

See TRUSTEE AND INCAPACITATED PERSONS ACT OF 1867 260

VOLENTI NON FIT INJURIA—

See NEGLIGENCE 119

WILL—

See REAL PROPERTY ACT OF 1861 68

Administration cum testamento ameno. Executrix outside the jurisdiction. Sureties. Letters of administration with probate of the will annexed, may be granted to a person outside the jurisdiction, on the usual sureties being given, where there are no legatees and no creditors in Queensland.

Re NARRACOTT'S WILL 154

Charitable bequest. The Religious, Educational and Charitable Institutions Act of 1861 (25 Vic., No. 19), s. 1, 3. A., by his will, after certain bequests had been satisfied, devised the residue of his estate "to the Presbyterian Church at Spring Hill, Brisbane, called St. Paul's, under the pastorate of the Rev. J. F. McSwaine," and directed his executor and trustee to pay and apply the same to and for the use and benefit of the said church as in his sole discretion should seem fit, or to pay the same to the churchwardens for the time being of such church, whose receipt should be a sufficient discharge. The will was not attested by three persons, nor registered under the provisions of The Religious, Educational and Charitable Institutions Act of 1861, but was attested by two witnesses and executed as required by The Succession Act of 1867.

In 1863, several Presbyterian congregations in Queensland joined themselves into an ecclesiastical body called the Presbyterian Church of Queensland. At a later period St. Paul's Church voluntarily joined with the other congregations. The Moderator, clerk, and treasurer of the General Assembly of the ecclesiastical body was duly incorporated under the name of "The Presbyterian Church of Queensland." St. Paul's Church, except so far as it was a part of that body, next became incorporated. No money or property of the congregation was sub-vested in the body known as the Presbyterian Church of Queensland or in the body corporate.

Held, by Harding, Cooper, and Real, JJ., that St. Paul's Church was an integral part of the Presbyterian Church, and that the bequest was invalid.

Held, also, that where a devise or bequest is made to any integral part of a corporation, registered under The Religious, Educational and Charitable Institutions Act, it is a bequest or devise to the corporation, and the corporation in the administration of other trusts applies the devise or bequest for the purposes of the particular part of the corporation to which the donor desired that it should be applied.

Per Harding, J., that where the whole of a religious body has once been incorporated by letters patent issued to it, the whole of the body with all its integral parts becomes a corporation for the purposes mentioned in the said Act, and that no integral part of that body is entitled to have issued to it letters patent for a corporation.

Re Swan's Will, 4 Q.L.J., 171, discussed and followed.

LASCELLES v. McSWAINE AND OTHERS 44

Codicils. Revocation. To D.'s will, found after his death, there were three codicils. The signature to the first codicil was found to have been struck through, and the words "Revoked and replaced by another codicil, dated 11th day of August, 1890," were written in testator's writing below the attestation clause, but were not attested. The third codicil was dated 11th August, 1890, but contained no formal revocation of the first codicil.

Held, that the first codicil was not revoked.

Re DAVENPORT'S WILL 235

Construction. Legal estate. Death of devise in trust before testator. Appointment of new trustees. New trustees beneficiary. The will of a testator who died after June, 1878, began thus:—I give my property as follows: "After my debts are paid to my sister, A. M." He appointed two executors, who predeceased him. By a codicil he gave to B. F. and her children "E. and H.," "notwithstanding the provisions of my will," half his property remaining after all his just debts were paid, the other half to go as directed by the will, "the property to be disposed of for the joint benefit of all interested."

Held, that the executors took the legal estate. The Curator of Intestate Estates consenting, new trustees were appointed in his stead. One of the new trustees was a beneficiary. He was required to give an undertaking to apply in the event of his becoming sole trustee for the appointment of a co-trustee before acting on the trusts.

Re Allen (Seton 4th ed. 539) v. *re Lighthody's Trusts* (52 L.P., 40) followed.

Re FERRETT'S TRUSTS 183

Construction. Devise for life or in fee. Gift by will of "all my messuages, lands, tenements, and hereditaments, all my household furniture, ready money, securities for money, money in banks, money secured by life assurance, goods and chattels, and all other my real and personal estate and effects whatsoever and wheresoever, unto my wife, H. E., to and for her own absolute use and benefit during her natural life, subject to the payment of my just debts, funeral and testamentary expenses, and the charges of proving this my will." The testator then appointed H. E. "sole and absolute executrix" of the will.

Held, that H. E. took an estate in fee.

Re EATON'S LANDS 289

Probate. Will of married woman. Separate estate, 54 Vic., No. 9, ss. 3, 7, 8, and 14. Policy of Assurance. A wife devised all her real and personal property, including a policy of assurance, to her husband, and appointed him executor of her will. The Registrar refused to grant probate.

Held, that the husband was entitled to probate, and that evidence of separate estate was unnecessary.

Re ATKINSON'S WILL 28

Probate Act of 1867 (31 Vic., No. 9), s. 32. Renunciation of executor abroad. Ancillary letters of probate. When probate of the will of a testator who has personal property in Queensland has been granted by the proper court of the country of his domicile to the executors, ancillary probate will, in the absence of special circumstances, be granted to the same persons, although they are out of the jurisdiction.

If special circumstances exist, rendering it undesirable to grant ancillary probate, the court may, under sec. 2 of *The Probate Act*, make a special grant of administration.

A grant of ancillary letters of probate was made to two of three executors, who had all proved in Victoria, leave being reserved to the third, who had attempted to renounce as to Queensland, to come in and apply for a grant.

Re HARDING'S WILL 225

Revocation. Cancelling. Some time after the execution of a will the words "cancelled in consequence of having given my wife the bulk of my property" were written on one page of the will, and signed by the testator.

Held, that this was not a revocation of the will.

Re A. R. JONES' WILL 261

Testamentary capacity. Delusions. Prior will. Revocation. Costs out of the estate. A man subject to delusions may make a will, and such a will is valid if the delusions did not affect him in disposing of his property. Where a testator is proved to have a delusion, the onus is on the persons propounding the will to prove that the delusion could not have affected the testator at the time of making his will.

A will was declared invalid on the ground that the testator suffered under a delusion as to his wife's fidelity. Probate of an earlier will, as contained in a draft copy and instructions, was granted on the evidence of one attesting witness. The earlier will had been revoked and burnt immediately after the second one had been executed. The costs of all parties were allowed out of the estate, but the defendant, who was the widow of the testator, was, under the circumstances, granted her costs as between solicitor and client.

Banks v. Goodfellow (L.R. 5 Q.B. 549); *Smee v. Smee* (6 P.D., 84), followed.

DAVIES v. WILLIAMS 278

WINDING UP—

Costs of. See **COSTS** 30

WRIT—

Amendment of. See **PRACTICE** 286

Brisbane :
PRINTED BY EDWARD POWELL, ELIZABETH STREET.

MDCCCXCVI.

THE QUEENSLAND LAW JOURNAL REPORTS.

Edited by P. B. MACGREGOR and M. J. O'SULLIVAN.

VOL. VI.

CIVIL COURT.

REAL, J. 24th and 25th October,
24th November, 1893.

GOLDSBROUGH, MORT AND COMPANY, LIMITED v.
DOYLE.

Crown Lands Act of 1884 (48 Vic., No. 28), ss. 48, 65, 67—Mortgage—Possession by mortgagee—Recovery of land—Foreign Company—Liquidation—British Companies Act of 1886, ss. 7, 12, 13—Personal property vesting in foreign liquidator.

D., the lessee of a grazing farm under *The Crown Lands Act of 1884*, by memorandum of mortgage in the form Schedule IV to that Act, mortgaged his farm to G. M. & Co., subject to certain covenants in a stock mortgage previously executed between the same parties, *mutatis mutandis*. D. made default in payment and died. His widow continued in possession. The mortgagees entered into possession and tried to sell by public auction, but without success. The widow refused to give up possession of an hotel on the farm, and the mortgagees brought an action for the recovery of the land. After the proceedings had been commenced, the plaintiff company, whose head office was in Victoria, was wound up and an official liquidator appointed, and a scheme of reconstruction approved. A winding-up petition was also presented in New South Wales. No order for winding up was made in Queensland, where the company was registered under *The British Companies Act of 1886*. The official liquidator sanctioned the continuation of the action.

Held, that default having been in the payment of the money due under the mortgage, a debt was created, and the official liquidator appointed in Victoria, representing the company, was entitled to possession of the land under *The Crown Lands Act of 1884*.

Held also, that there being no governing authority here and no local liquidator, the Company itself might have continued the action.

Quære, whether realty in Queensland would vest in the liquidator of a foreign company since *The British Companies Act of 1886*, unless an order for winding up had been made in Queensland.

Selbrig v. Davies, 2 Dow., 230; *Banco de Portugal v Waddell*, 5 Ap. Ca., 161, followed.

ACTION for the recovery of possession of land, heard before Real, J., the jury by consent being discharged.

The statement of claim alleged that the defendant was the widow and devisee of Michael Doyle, deceased; that Doyle was the lessee under *The Crown Lands Act of 1884* of a grazing farm in Claverton Resumption, near Cunnamulla, in Queensland; that Doyle mortgaged the farm, by a memorandum of mortgage in the form prescribed in Schedule IV to that Act, to Goldsbrough, Mort and Company, Limited; that the memorandum of mortgage was, *mutatis mutandis*, subject to the covenants contained in a stock mortgage previously made between the same parties; that the memorandum of mortgage was registered as required by that Act; that Doyle made default in payment of the interest; that Doyle died and probate of his will was granted to the defendant; that the plaintiffs entered into possession of the farm; that the defendant was in possession on the date of entry by the mortgagees, and refused to give up possession. The plaintiffs claimed a declaration that they were entitled to possession of the said grazing farm, and claimed possession

thereof. The defence was a general traverse of the claim.

From the evidence it appeared that the plaintiffs, whose head office was in Victoria, were registered here under *The British Companies Act of 1886*. A copy of the *Government Gazette* containing the registration of R. Goldsbrough and Company, as well as the certificate of the Registrar, under s. 12 of *The Companies Act, 1863*, of the change of name to Goldsbrough, Mort and Company, Limited, were put in. An order had been made for winding up the company in Victoria, and for the appointment of an official liquidator, with power *inter alia* to bring any action in the name of the company. A scheme of reconstruction for the transfer of the assets of the company to a new company of the same name was approved. A petition for winding up was also presented to the Supreme Court of New South Wales, and all proceedings stayed thereon. No petition for winding up was presented in Queensland. Sealed copies of the orders made in Victoria were filed here. The official liquidator in Victoria sanctioned the continuation of the action, which had been instituted here before the liquidation of the company. Doyle made default in payment of the money secured by the mortgage, and died. His widow continued in possession. Possession was taken on behalf of the plaintiffs, after demand, on 16th January, 1893, but the defendant refused to give up possession of an hotel on the farm. The plaintiffs endeavoured to sell the farm by public auction in Cunnamulla, but without success, and the defendant declined to quit except on compensation being made by the plaintiffs. The defendant was furnished with an account showing the amount of indebtedness to the mortgagees. The plaintiffs therefore instituted this action, by writ of summons, on 17th May last. A consent order was made for taking evidence on commission in Sydney.

Feez and *Scott* for the plaintiffs; *Power* for defendant.

Lesley Herring, a managing director of the company in Sydney, gave evidence that the action

was commenced before the liquidation, and was being continued by the official liquidator. An objection was taken to the evidence at the time, but the witness was not cross-examined as to the source of his knowledge.

Power objected to the admission of the evidence as hearsay. The authority of the liquidator to sue should be in writing, also his instructions to the solicitors to bring the action.

Feez contended the official liquidator might have been instructed by the witness to continue the action, or the witness may have been authorised by the liquidator to instruct the solicitors to continue.

REAL, J.: The witness could have been cross-examined as to his knowledge. That was not done. By *Order VII* an attorney can be asked the name of his client, and on whose authority the action is being brought. I admit the evidence.

Power then objected that the company was being wound up, and the proceedings should be brought in the incorporated name of the company by the official liquidator. *Dacey on Parties*, 169. The liquidator appointed in New South Wales is the only person who has authority to bring the action. [REAL, J.: If that were my view I would adjourn the case.] The official liquidator must obtain the sanction of the Supreme Court of Queensland to bring an action. *Companies Act*, s. 94.

Feez: The action is being brought in the name of the company, and not in that of the liquidator. *Lindley on Companies*, 5th Ed., 263. The action was commenced before the winding up, and is being continued by the official liquidator. Leave is unnecessary. *Lindley*, 713.

REAL, J.: Pleas in abatement are abolished now by *O. XIX.*, r. 12, and an action does not abate by reason of insolvency if the cause of action survive. *O. XLIX.* It is always a question of amendment now. I give the plaintiffs leave to make all necessary amendments, with leave to the defendant to amend and defend.

The statement of claim was then amended by alleging that the company was in liquidation, that

an official liquidator had been appointed by the Supreme Court of Victoria, and that the action was being continued by the said liquidator.

Power applied for a nonsuit on the grounds (1) that the old company had been wound up and there was no proof of registration of the new company in Queensland. By clause 1 of the scheme of reconstruction a new company is to be formed; by clause 5 the assets of the old company are to be transferred to the new company; clause 15 deals with the realisation of loans upon security of freehold and leasehold stations; clause 25 enacts that so soon as the sanction of the Court can be obtained the new company is to commence business. [REAL, J.: The old company is suing.] (2) That an official liquidator ought to have been appointed here. This Court has no control over a liquidator appointed in Victoria. By sec. 7 of *The British Companies Act* a company registered under that Act is subject to the same obligations, liabilities, and disabilities as a company incorporated under *The Companies Act, 1863* (see ss. 91, 94). [REAL, J.: Must a foreign company be wound up here if there are no creditors in Queensland?] Yes; by the proviso to sec. 7 no foreign company can take land in Queensland except under the conditions imposed by the constitution of the company. [*Feex*: The company can acquire land under the memorandum and articles of association.] Sec. 12 of *The British Companies Act* gives this Court power to wind up a foreign company. By sec. 13 land in Queensland is a first charge on the debts contracted in Queensland. If the company is not wound up here all the lands might vest in the official liquidator in Victoria. [REAL, J.: The company is incorporated subject to the laws of the colony in which it is incorporated. The company is governed by directors, until certain things happen, and a liquidator or other officer is appointed. When those things happen an officer is appointed by the Court. Nothing has been done in this colony. We are not concerned with the constitution outside the colony, except for the purpose of protecting the interests of persons in the colony. If the

company is not being wound up here, there is nothing to stop them going on; if it is being wound up here the liquidator must sue.] A liquidator should be appointed here, and leave is necessary for him to sue. (3) The mortgage is in the form of Schedule IV as prescribed by sec. 65 to *The Crown Lands Act of 1884*, and concludes by giving the mortgagees, in case of default, power to sell in accordance with the provisions of the Act as in sec. 67, subsec. 2. Their remedy is limited to selling. They attempted to sell by public auction, and the defendant was willing to assist them. [REAL, J.: I am against you on that. The words "according to the tenor thereof" refer to the default in payment. By sec. 67, subsec. 1 the mortgagee may enter into possession and remain there twelve months, or for a further time if allowed by the Board, otherwise the lease is forfeited.] (4) The company cannot take possession under sec. 48. [REAL, J.: That section is vague and doubtful. It might apply to persons holding lands, not to mortgagees. If it were so it would limit the power to mortgage. No trustees could then lend on such a security.] It might lead to dummyping. [REAL, J.: That would not happen; mortgagees are empowered to take possession for twelve months.] (5) There is no proof that Mrs. Doyle is the executrix of the mortgagor. Probate of a will has been put in, but there is no proof of identity. [REAL, J.: She is in possession.] So are they. They could have sued her for the debt due on the mortgage. There is no evidence that she is in possession now.

REAL, J.: The two questions to be decided are—(1) Can section 13 of *The British Companies Act* be given effect to without the company being wound up here? and (2) was the defendant in possession at the date of the issue of the writ?

An adjournment was granted to prove possession at the date of the commencement of the action, the plaintiffs to pay the costs occasioned by the adjournment, and to have no costs up to date.

On 24th November evidence was given that the

defendant was in possession of the hotel on the farm, and refused to go out, and was locking the gates leading into the paddocks.

Power: There is no evidence of refusing to give up possession. The defendant has been allowed to carry on the hotel and get the license renewed. [REAL, J.: The writ is a demand for possession.] There is no authority to bring this action here. If there is no liquidation here, who is entitled to the assets?

REAL, J.: There is no doubt that if anyone puts a company into liquidation here the liquidator appointed will hold the property, and not the company. The only question is—Who is to be recognised as the governing authority of the company outside the colony? The directors have ceased to exist by virtue of the liquidation. At present I am inclined to think there must be some governing authority. If there were local directors no question would arise. All the personal property would pass to the liquidator according to the laws of Queensland, unless something intervened. Otherwise there was no authority. It might be that there was no authority. It might be contemplated that whenever there was a liquidation elsewhere there must be a liquidation here. But, as that would be putting an unnecessary burden on parties carrying on business here, I am not inclined to hold it. My inclination is to hold that until some one intervenes they could take this action. I do not know what is the Victorian law upon it. At present it has not been shown to me that the Victorian liquidator is anybody. There is nothing to show me that the appointment of the liquidator at all interferes with the company. That will depend upon what the Victorian law is. Up to now the assumption has been that the Victorian law is practically the same as ours. Victoria is to a certain extent a foreign country, and its laws will have to be proved. The effect of the appointment of the liquidator depends on the law relating to the winding up of companies in the particular place in which the appointment was made. The Victorian law being a question of fact must be proved. I cannot take judicial

notice of it. The company is not here now. It is admitted between the parties that now only the person who has been appointed in Victoria is here. Had the action been brought in the company's name, and there had been no more than that, I should have taken no notice of it. But it was admitted for the purposes of the trial that the action was brought by the liquidator appointed in Victoria, and that Messrs. Hart, Flower, and Drury were the solicitors of that liquidator, and nobody else. Had the proceedings gone on and no liquidation taken place I should not have taken any notice of it. But here is a company registered under our law, under which it has all the powers and authorities of any other company registered under the Act. But that is not the case which comes before me. As it came before me it was proved that the company which existed was liquidated in Victoria. The question arises, what are the powers of the official liquidator in Victoria?

Evidence was then given that the law relating to companies and winding up of companies, and the effect of such winding up, and the right and powers of a liquidator appointed by the Victorian Supreme Court to and over the property, were substantially the same as under *The Queensland Companies Act, 1863*, and that where a liquidator was authorised to bring an action without the sanction of the Court, he could, without leave, continue an action commenced before the liquidation.

Feez then moved for judgment for the plaintiff. Formal demand was made for possession and refused. The official liquidator represents the company and is entitled to the land, sec. 7, *British Companies Act*. Section 13 protects mortgages. [REAL, J.: That refers to land subject to a mortgage. If the defendant was insolvent, or execution issued under a *fi. fa.*, the land would be still subject to the mortgage.] The property is leasehold and passes to the liquidator in Victoria. *Selkrig v. Davies*, 2 Dow, 230; 2 *Rose*, 291. It was decided here in *Central Queensland Meat Co. v. Bury*, by Cockle, C.J., 1 Q.L.R. (Pt. II.), 116, that lands in Queensland

would not vest in a foreign liquidator in preference to creditors in Queensland. There is no evidence that the company has any creditors here. Since then *The British Companies Act* has been passed. Section 67 of *The Crown Lands Act* gives power to take possession for twelve months.

REAL, J., referred to *Banco de Portugal v. Waddell*, 5 Ap. Ca., 161.

Power: The liquidator appointed by another Court will not be recognised here.

REAL, J.: How do you get over the Scotch case? The Act only recognises a debt, and allows possession for twelve months. A nice question may arise when you want to deal with real property. I regard this matter as a debt, and the land a mere adjunct. Personalty vests in the official liquidator solely by the law of the debtor's domicile. Following that analogy, this property vests in the liquidator, unless some act is done in this colony to prevent it.

REAL, J., then delivered judgment as follows: This is an action commenced by the plaintiff company when it was a going concern. Subsequent to the commencement of the action a petition for liquidation was filed in Victoria, which was the place where the company first came into existence and may be said to be its domicile or place where it originated. A liquidator was appointed by the Court with powers to commence and carry on actions without the sanction of the Court. It appeared also in the course of the proceedings that a liquidator was appointed in New South Wales, but that had nothing to do with the present matter. The company was registered prior to the commencement of this action, and, therefore, prior to the commencement of the liquidation proceedings in Victoria. The company was registered under *The British Companies Act*, an Act which empowers companies existing in Great Britain or outside the colonies to register in this colony, upon which registration they receive certain powers, rights, privileges, and authorities in a great measure the same as our own companies. There is one provision amongst others that its right to hold land shall be

no greater in this colony than in the colony in which it originated. The plaintiff company carried on business in this colony, at all events, to the extent of lending money. There is no evidence before me that in any other respect they carried on business in the colony. It was admitted by the parties to the action that it had no local directors in the colony and that it was merely registered and had an office in compliance with the conditions of *The British Companies Act*. The governing body of the company was in Victoria, the place where the company came into existence and went into liquidation. That governing body was superseded by the liquidator, who took their place under the law which was said to be in substance the same as our law. Therefore, it is clear that all the rights, powers, and authorities which theretofore vested in the directors became vested in the official liquidator, subject to certain matters on which he had to obtain the sanction of the Court. It was expressly excepted that he had not to obtain the sanction of the Court in order to commence or continue any action on behalf of the company. Apart from the provisions of our Act, would this property, or rather debt, due from the deceased Doyle pass by the ordinary law to the liquidator? It appears to me that that question is governed and decided by the cases of *Selkrig v. Davies*, 2 Dow., 230; 2 Rose, 97, 291; and *Banco de Portugal v. Waddell*, 5 Ap. Ca., 161. On the authority of those cases it may be taken that the right to recover debts passes to the liquidator subject to any restrictions of that right which may be imposed by special laws of this colony. So far as it is necessary for me to decide the present case I am satisfied that the liquidator stands in the same position that the governing body, which he had superseded, stood in. He was entitled to the custody of the property of the company and was entitled to that wherever the property was situated, subject to the laws of nations. This claim was against the defendant solely as the representative of Doyle, who was a debtor to the company. It was a claim solely in respect of the debt, and was a claim in which they had not even

the ordinary privileges of the mortgagee. They were only allowed under *The Crown Lands Act of 1884* to hold the security for twelve months, during which time they must sell it to a person answering to the description given in the Act of the person capable of holding a lease of this nature. Certainly they might hold it for longer than twelve months if they obtained the consent of the Land Board. I see nothing in the Act which prevents the general law applicable to this case applying, and therefore it seems to me that my decision must be in favour of the plaintiffs. The order will be as prayed. I accordingly give judgment for the plaintiff company, but in pursuance of my order of the 25th October, refuse to allow them any costs up to the adjournment, and they are to pay the defendant's costs of, and occasioned by, the adjournment.

Solicitors for plaintiff: *Hart, Flower & Drury*.

Solicitor for defendant: *Bunton*.

NOVEMBER SITTINGS OF FULL COURT.

ARIDA v. SID.

Practice—Specially indorsed Writ—O. XIV.—Interest—Promissory Note—Bills of Exchange Act (48 Vic., No. 10), s. 58—Final judgment—Rehearing—Affidavit—O. LVII., r. 6—Costs.

The indorsement upon a writ of summons in an action upon a promissory note, contained a claim for interest, without stating any rate or authority for the same.

Held, that the writ was specially indorsed within O. III., r. 6, and that the indorsement need not contain a statement that interest was claimed by law, on account of s. 58 of *The Bills of Exchange Act*, whereby interest is to be deemed liquidated damages. On the rehearing of an order for final judgment, further affidavits may be read by the appellant as of right, but the appellant, even though successful, will have to pay the costs of the appeal.

Sands McDougall & Co. v. Nind, 18 V.L.R., 673, dissented from.

APPEAL from an order of Cooper, J., giving leave to the plaintiff to sign final judgment on a specially indorsed writ for £600 due on a promissory note with interest to the date of the writ.

MacDonnell for the defendant. The writ was not specially indorsed. The writ claimed interest, but did not state the rate or by what authority it was claimed. Interest must be stated to be by contract or by statute. *Gold Ores Reduction Co. v. Parr* (1892), 2 Q.B., 14. The point has been decided in Victoria. *Sands McDougall & Co. v. Nind*, 18 V.L.R., 673.

REAL, J.: I have decided otherwise in Chambers.

HARDING, J.: Those are decisions of single judges who will, no doubt, be set right by their own Full Court.

Counsel then proceeded to read an affidavit of John Marsland, which was not produced before the judge in Chambers.

Lilley, for the respondent, objected.

GRIFFITH, C.J.: Do you ask leave to read it, Mr. MacDonnell?

MacDonnell: No. I claim to read it as a matter of right, *O. LVII., r. 6*. An order for final judgment is an interlocutory order until judgment is signed. *Standard Discount Co. v. De la Grange*, 3 C.P.D., 67.

REAL, J.: Further affidavits were read in *Royal Bank v. Hipwood*, 4 Q.L.J., 108. In the case of *Hobson v. Plant*, before the late Chief Justice, leave to defend was given on a rehearing, but the defendant had to pay the costs, although he finally succeeded in the action, as it was through his own fault the affidavits were not read on the original summons.

The affidavit was then read, and the deponent stated that the defendant had told him that the plaintiff admitted that he owed the defendant over £300 and that he could recover it at any time.

HARDING, J.: If we give an adjournment it will only raise an issue.

Lilley referred to *Lawrence v. Wilcocks* (1892), 1 Q.B., 696; and *Blood v. Robinson*, 36 Sol. Jo., 203. Interest is allowed by statute. The judgment should be affirmed as to the amount not in dispute. If leave to defend is given as to the balance, the money should be paid into court, following the usual rule in cases of promissory notes. The appellant should pay costs.

GRIFFITH, C.J.: This is an appeal from Cooper, J., on the ground that the writ was not specially indorsed within the meaning of Order XIV., Rule 1A, which allows summary judgment. The action was on a promissory note, and the amount claimed includes interest on the promissory note. The point taken is that the indorsement does not say that the interest is claimed under a statute. I should not have thought it necessary to deliver a formal judgment had it not been for the Victorian case quoted, in which Williams, J., held on the construction of a similar rule in Victoria, that the indorsement in the case of a promissory note must state that interest is claimed by law. That judgment appears to have been founded upon some observations made by Mathew, J., in the case of *The Gold Ores Reduction Co., Limited v. Parr* (1892), 2 Q.B., 14. That was an action for calls on shares on which interest is not payable under a statute. The interest was, in fact, claimed under a contract, but the indorsement did not show that there was any contract for the payment of interest, and it was held that the indorsement was not sufficient. The passage which was relied upon is as follows:—"It is most important that a defendant should know from the writ what the exact claim against him is. The cases which have been referred to in argument established that, in order to constitute a good special indorsement within the meaning of Order III., r. 6, and Order XIV., r. 1, the writ should show that interest claimed is payable under a contract, or, as in the case of a bill of exchange, is an amount fixed by statute." That appears to have been taken in the Victorian case to mean that the indorsement must expressly state either that the interest claimed is payable under a contract, or that it is claimed and is payable by virtue of some statute. But that is not the point to which the mind of the Court was directed. The question before them was this: The indorsement did not show that interest was payable at all, and they held that it must show that it is payable, either under contract or by law. If it is payable under contract, the indorsement must say so,

and if it is payable under a statute, the indorsement must show, but need not expressly state that it is so payable. In the present case the writ does show that the interest is payable by law. The action is on a promissory note which carries interest, which is to be deemed to be liquidated damages under *The Bills of Exchange Act*. It seems to me that the Victorian case is founded entirely upon a misapprehension of the words of Mathew, J., and it is quite inconsistent with *Lawrence v. Wilcocks* (1892), 1 Q.B., 696, which is a decision of the Court of Appeal. I should not have said anything about it, except out of respect for Mr. Justice Williams. The appeal in this case is also on the merits, and an affidavit has been put in as on a re-hearing. This affidavit was not before Cooper, J., and the appeal must fail so far as it is an appeal on the facts before him. On the materials now before us, the judge would probably have allowed the defendant to defend as to part of the claim, and the amount on which judgment would have been given, would have been £244 1s. 2d., with interest on £275 1s. 2d., up to date of writ. Although the appellant is entitled to this relief, he ought to pay the costs of the appeal. The judgment of the Court, therefore, will be: Affirm the order of Cooper, J., as to £244 1s. 2d., with interest on £275 1s. 2d. to date of the writ; leave to defend as to the balance (H. 5); the appellant to pay the costs of the appeal. I do not see any reason to direct that the money should be paid into court. Such an order, under the circumstances of this case, would be virtually equivalent to final judgment for the plaintiff.

HARDING and REAL, JJ, concurred.

Solicitors for plaintiff: *Roberts & Roberts*, agents for *Roberts & Lou*.

Solicitors for defendant: *Hollicar*, agent for *Marsland & Marsland*.

Re COULSON, AN INSOLVENT.

Insolvency Act of 1874 (38 Vic, No. 5), s. 167, sub. 2, r. 78—Certificate of Discharge—Special resolution—Official Trustee—Proof of debt.

C. having been adjudicated insolvent, a meeting of creditors was held, at which one creditor was present in addition to the official trustee, who appeared in his capacity as trustee in two other estates. A special resolution was passed dispensing with the last examination of the insolvent, and that the insolvency had arisen from circumstances for which the insolvent could not justly be held responsible.

Held, that the resolution was properly carried; that the Court could not go behind it, and that the insolvent was entitled to his discharge.

APPLICATION for a certificate of discharge under s. 167, sub. 2 of *The Insolvency Act*, referred to the Full Court by Griffith, C.J.

The adjudication was made on 11th October, 1889. A meeting of creditors was not held till 14th July, 1893, when three proofs were put in—one for £16 5s., by the insolvent's solicitor, and two by the official trustee, in his capacity as trustee in two other estates (one for £6, and the other for £1 19s. 6d.). A resolution was carried that the insolvency had arisen from circumstances for which the insolvent could not justly be held responsible. There was nothing in the trustee's report to indicate the cause of insolvency.

O'Sullivan for the insolvent.

GRIFFITH, C.J.: I question whether the official trustee, when he himself is a creditor, can vote at a meeting for the purpose of making a quorum competent to pass resolutions in favour of the insolvent's discharge.

O'Sullivan: The same thing constantly happens.

GRIFFITH, C.J.: As a general rule I doubt the propriety of the trustee in an estate voting in his capacity as a trustee in another estate. In the present case it virtually amounts to the trustee giving the insolvent his discharge, and I am asked to give effect to resolutions carried by Mr. Hall. I do not regard myself as a mere automaton in these cases. I would like to know the practice. The circumstances of this case are so peculiar that

I shall refer the matter to the Full Court, in order that the practice may be settled.

The application came on at the November Full Court.

REAL, J.: The first question the Court has to consider is, whether the trustee in an insolvent estate has the right to vote on a resolution in the insolvency of a debtor?

Lilley, for the insolvent, stated that it had been the practice for him to do so for years past; and submitted the Court could not go behind a resolution of that kind. By Rule 78 one creditor could pass a resolution, so that the practice could be left out altogether in this case.

GRIFFITH, C.J.: I referred this matter to the Full Court, because the circumstances connected with it are very peculiar. The application for a certificate of discharge was made nearly four years after the adjudication. No debts had been proved, and only £3 had been realised. Steps were then taken for the purpose of getting the insolvent his discharge. The official trustee was requested to summon a meeting of creditors. Under the rules the trustee is bound to give notice to all the creditors mentioned in the statement of affairs, whether they have proved their debts or not. In response to that notice, three proofs were put in—one by a creditor for £16, and two others by the official trustee as trustee in two other insolvent estates (one for £6, and the other for £1 19s. 6d.). These claims were allowed, and at the meeting the three creditors passed a resolution to the effect that the insolvency had arisen from circumstances for which the insolvent could not justly be held responsible, that the last examination should be dispensed with, and that a certificate of discharge should be granted. One of the circumstances connected with the case was that the largest creditor voting was the insolvent's solicitor. And it seemed to me that the official trustee took up an extraordinary position, for it did not appear from the trustee's report that there was anything to lead him to the conclusion that the insolvency had arisen from circumstances for which the insolvent could not

justly be held responsible. I experienced the same difficulty in dealing with the application as had been experienced by Lord Justice Turner in a somewhat similar case. I refer to *Ex parte Glass, Re Boswall* (31 L.J., Bankruptcy 73), in which the Lord Justice said that he thought it difficult, if not impossible, to impute to the legislature an intention that a court of justice should be bound to do what in its judgment ought not to be done. In the case, however, of *Re Mew* (*Ib.* p. 87), decided in the same year, two or three months later, he was held by Lord Westbury, C., to be wrong. I feel bound by that decision, and, therefore, think that the resolution come to by the creditors must be upheld, especially as it was legally carried even without taking into consideration the votes of the trustee. I would, however, advise the official trustee to hesitate before again acting in the same way under such circumstances.

HARDING, J.: I see no reason to depart from what has been the practice of the Court since 1881. I summarised the result of the cases decided in *re Quinn*, 1 Q.L.J., 19. The other creditors have taken no steps to impeach the *bona fides* of the proceedings. I think the certificate must be granted. The official trustee is an officer of the Court, and the Court will not presume he has acted wrongly without evidence being produced.

REAL, J.: I agree for the same reason.

Solicitors: *Lilley & O'Sullivan*.

THE QUEEN v. MORRIS AND OTHERS.

Certiorari—Jurisdiction—Licensing Act (49 Vic., No. 18), s.s. 33, 40, 41, 115, 124, 125, sub. 3—Local Option—Provisional Certificate—Adjournment—Disqualification of Justices.

On 5th March, 1889, the third resolution of the Local Option provisions of *The Licensing Act* was adopted, prohibiting the issue of new licenses within the Municipality of Charters Towers. On 14th March, 1893, A. gave notice of application for a provisional certificate for a house to be erected within the municipality, and published the prescribed notices.

On 5th April A.'s application was adjourned to 3rd May. On 22nd April the resolution as to Local Option was rescinded, and on 3rd May a provisional certificate was granted to A. On 14th June C. gave notice of application for a licensed victualler's license for the same premises. The license was ultimately granted to C., objections being overruled. L., a householder within the municipality, applied for a writ of *certiorari*, on the grounds that the justices had no jurisdiction either to adjourn or grant the application, and that M., one of the justices, was an interested party.

Held, by Cooper, J. (Chubb, J., *dissentiente*), that there was nothing in *The Licensing Act* to prevent the grant of a provisional certificate under the circumstances; that the justices had a discretion to adjourn the application of A., and the license was properly granted to C.; that L. was not "a person aggrieved" and entitled to a writ of *certiorari*, and that the order *nisi* must be discharged with costs.

Held, on appeal, by Harding and Real, JJ. (Griffith, C.J., *dissenting*), that s. 124 only applies to the granting of certificates for licensed victuallers' and winesellers' licenses, and does not prohibit provisional certificates being granted while the Local Option resolution is in force; that the justices had jurisdiction to grant the license, and that the rule must be discharged.

Per Griffith, C.J., that the prohibition to grant new licenses laid upon the Licensing Authority by the third resolution as to Local Option extended to the granting of provisional certificates; that as the bench had no authority to grant the provisional certificate on 5th April, they could not give themselves jurisdiction by adjournment to 3rd May; that M., one of the justices was an interested party, and the rule should be made absolute on all grounds.

Per Curiam, that where a justice, who has a personal interest in the subject matter takes part in the decision, the decision cannot stand, and is liable to be quashed on *certiorari*.

MOTION to make absolute an order *nisi* calling upon C. A. M. Morris, Chairman of the Licensing Authority for the Licensing District of Charters Towers, and W. J. Paull, E. D. Miles, E. H. T. Plant, D. Missingham, W. D. Canny, and Richard Kirkbride, licensing magistrates, and A. H. Anderson and Thomas Cox, to show cause why a writ of *certiorari* should not issue to remove into the Supreme Court, Townsville, the record of proceedings and orders of the Licensing Authority granting certificates to Andrew Harper Anderson and Thomas Cox, and why David Missingham and four of the justices—C. A. M. Morris, E. D. Miles, W. P. Canny, and R. Kirkbride, the justices

constituting a majority of the justices, and Andrew Harper Anderson and Thomas Cox should not be ordered to pay the costs of applying for and obtaining the writ of *certiorari* on the grounds:—

(1) That on the 5th April the premises referred to were within an area then subject to the operation of the third resolution of the Local Option clauses of *The Licensing Act*, and that the Licensing Authority had no jurisdiction to consider or grant such an application. (2) That the adjournment of a proceeding on 5th April by a Court then without jurisdiction could not confer jurisdiction upon the same Court as regards the same proceeding on 3rd May, 1893, as no new application with regard thereto had been made to the Court, and 21 days' notice of such application, if made, could not possibly have been given. (3) That D. Missingham, a member of the Licensing Authority present at, and taking part in, the judgment of 3rd May, was interested in the granting of the application, having been employed as draftsman of the building to be erected. (4) and other grounds appearing on the face of the proceedings.

The relator was W. J. Lloyd, a householder, residing in the area affected by the resolution, within half-a-mile of the premises in question.

The facts appear fully in the judgments.

Costello, for the relator, moved the order absolute.

Jameson, for a majority of the bench, on the question of costs.

Costello contended that the provisional license could not be granted while the Local Option resolution was in force, and consequently the order for adjournment was invalid. Objections were taken to Cox's application but overruled. S. 33 shews the procedure to obtain a provisional certificate. After a provisional certificate had been issued the public could not come in and make objection to the issue of the license to Cox on all the seven grounds allowed by the Act. Missingham had a pecuniary interest, and ought not to have sat on the bench. *Murphy v. Ithaca Divisional Board*, 3 Q.L.J., 86. The magistrates

disregarded the objection to the issue of the provisional certificate, and should pay the costs.

COOPER, J.: Magistrates will have to pay costs only in cases of gross misconduct or wrong doing, not for an honest mistake.

Macnaughton submitted that in cases of *certiorari* there is a distinction when a person is aggrieved, and when he comes forward as one of the public. *Mellor's Crown Practice*, 117; *R. v. Justices of Surrey*, L.R., 5 Q.B., 566. There was nothing to shew the relator was a person aggrieved. Missingham was not proved to have had such a substantial interest as to excite a real bias *R. v. Handsley*, 8 Q.B.D., 388; and *R. v. Farrant*, 20 Q.B.D., 51. While the third resolution of the Local Option clauses was in force it was competent for a provisional certificate, but not a license to be granted. Only the house, and not any person, was aimed at by the Local Option clauses. There is no connection between the issue of a provisional certificate and the selling of liquors, which the Local Option clauses specially restrict. There was nothing for the third resolution to take hold upon until a new license was applied for. Assuming that the Board could not grant the certificate on 5th April they could on 3rd May, the Local Option clauses in the meantime having been rescinded. *R. v. Pownall*, reported in *Law Times* newspaper, 17th June. By s. 17 of the *Liquor Act of 1886*, meetings of a licensing bench can be held monthly and can be adjourned. On the general point as to the discretion of the Court to grant the writ, Cox was a proper person to hold a license; no person had been aggrieved, and there was nothing to show that the Court should exercise its discretion.

Costello, in reply: The provisional certificate was a necessary process in the issue of the license—in fact was a license. As to the relator being the party aggrieved, Lloyd was in the same position as T. B. Cribb in the case of *R. v. Yaldwyn*, 3 Q.L.J., 144. Lloyd was a householder living within half-a-mile of the hotel, and was a proper person to object, and was aggrieved because of the greater facilities for the sale and consumption of

intoxicating liquor given by the issue of the license.

COOPER, J.: This was a motion to make absolute an order *nisi* for a writ of *certiorari* against A. H. Anderson and Thomas Cox, and against the licensing magistrates who had, it was alleged, in violation of the provisions of *The Licensing Act*, granted a provisional certificate to Anderson and a licensed victualler's license to Cox. The facts, so far as it is necessary to state them for the purposes of this judgment, are as follow:—About four years ago the residents of a certain area in Charters Towers adopted the third resolution of the Local Option clauses of *The Licensing Act*, and, therefore, for the last two years the said resolution has been liable to rescission, and was, in fact, rescinded on the 22nd April last. On the 15th March the respondent Anderson gave notice of his intention to apply before the next ensuing quarterly meeting of the justices for a provisional certificate for certain premises not then completely erected, which he intended to be occupied as a public house. On the 5th April the licensing justices adjourned the application for a month, and on the 3rd May issued the certificate. On the 14th June the respondent Cox applied for a licensed victualler's license for the premises which had meanwhile been completed, and it was granted in July. The order *nisi* was obtained on three grounds:—(1) That the licensing justices had no jurisdiction to entertain Anderson's application; (2) That consequently they had no power to adjourn its consideration; and (3) That David Missingham, one of the justices who adjudicated on the 3rd May, was "interested in the grant" of the application. The evidence produced by the relator satisfies me that David Missingham had no pecuniary interest in the grant of the application, or any other reason which could be reasonably supposed to bias his judgment in the matter. I am of opinion that the 124th section of the Act, which defines the consequences ensuing upon the adoption of the 3rd resolution, operates in restraint of a trade which, although it may be regarded with disfavour at any parti-

cular time by a majority of persons resident within a specified area, has not been condemned by the Legislature, and the section must, therefore, be construed strictly by Courts of Law; and its words, unless clearly expressed, may not be invested with a meaning which would have the effect of needlessly hampering a recognised trade, in putting unnecessary impediments in the way of legitimate enterprise. The majority who adopt the 3rd resolution—viz., "That no more licenses be granted," may repent of their option, and at any time after the expiration of two years may undo what they have done. In the absence of express words to that effect, I cannot hold that the legislature intended to prohibit persons, who may be aware of the change in public opinion, from erecting premises fit for the purposes of a licensed victualler in anticipation of a rescission of the resolution, or to prevent the licensing justices from granting a certificate that such premises fulfil the requirements of the Act. An investor may be well content to obtain such certificate and wait till public opinion changes, and I cannot see that the Act forbids him the indulgence of a hope, which, as the event showed in this case, cannot be regarded as unreasonable. I am, therefore, of opinion that the justices were right in entertaining Anderson's application of the 5th April; that they exercised a proper discretion in adjourning it, and were justified in granting it; and that they were acting within their jurisdiction in issuing the license to Cox. I also think that the relator, in objecting to the proceedings of the justices, was merely acting as one of the public who opposed the granting of the license on general grounds, and was not a "person aggrieved" in any special sense; and, therefore, that he is not entitled *ex debito justitiæ*, even if the justices were technically wrong, to the particular form of relief which he seeks. The license and the premises seem to me to fulfil the requirements of the law, and I can see no reason, even if I disagreed with the proceedings of the justices, for disturbing a decision which has probably been of substantial benefit to one or more, and, so far

as I can see, has injured no person. My brother Chubb takes a different view of the case, but the judgment of the Court will be that the order is discharged with costs.

CHUBB, J.: This rule was granted by me on the application of William Lloyd, a person entitled, under sec. 50 of *The Licensing Act*, as a householder within the area affected by the license granted for the Theatre Royal Hotel, Charters Towers, to object to the granting of the license. The rule was granted upon three grounds, namely:—1. That, as on the fifth day of April, 1893, being the day on which the application by A. H. Anderson was to be heard, the premises referred to in the said application were within an area then subject to the operation of the third resolution of the Local Option clauses of *The Licensing Act of 1895*, the said Licensing Authority had no jurisdiction to consider or grant such an application. 2. That the adjournment of a proceeding on the said fifth day of April by a Court then without jurisdiction could not confer jurisdiction upon the same Court as regards the same proceeding on the third day of May, 1893, as no new application with regard thereto had been made to the said Court, and twenty-one days' notice of such application, if made, could not possibly have been given. 3. That David Missingham, a member of the said Licensing Authority on the said third day of May, was interested in the grant of the said application, the said David Missingham having been then employed as draftsman of the building to be erected in accordance with the plans and specifications referred to in the said provisional certificate. The material facts raising the questions of law to be determined are as follows:—On 5th March, 1889, the third resolution of the Local Option provisions of *The Licensing Act* was adopted, prohibiting the issue of new licenses within the whole area comprised within the Municipality of Charters Towers, subsecs. 115, 124. Due notice of the resolution was given to the proper authorities. On the 14th March, 1893, the respondent, Anderson, in the prescribed manner,

gave notice of application for a provisional certificate for a house to be thereafter erected, and published the prescribed notices, subsecs. 28, 33, sched. 4, form 5. On the 5th April following, the quarterly meeting of the Licensing Authority was held, and Anderson's application was heard and adjourned to 3rd May. Between these dates, namely, on 22nd April, the before-mentioned resolution having been in force for over four years (form 3 sched. 7) was rescinded. On 3rd May a provisional certificate was granted to Anderson, the erection of the premises within three months being the only condition imposed by the certificate. On the 14th June the respondent, Cox, in the prescribed manner gave notice of application for a licensed victualler's license for the same premises. All his notices stated that "a provisional certificate had been granted for the premises." The application was heard on the 5th July, and after one or two adjournments was granted on the 13th July. On the 5th an objection to the granting of the license was taken on a petition previously lodged by some 49 householders, ratepayers, and others under subsecs. 40, 41. On objection taken by Mr. Marsland, Cox's solicitor, the Licensing Authority held that as no notice of objection had been given except by one of the petitioners, Henry Murgatroyd, he was the only objector entitled to be heard. Cox's solicitor then put in the notices, the newspapers, and Anderson's provisional certificate in support of the application, and then objected to any objections being heard except—1. That applicant was not a fit person to hold a license. 2. That the house had not been erected in accordance with the conditions under which the provisional certificate was granted. These are the only objections allowed by subsec. 6 sec. 33. The notes of the proceedings before the Licensing Authority are neither as full nor as clear as I think they ought to be in a case like this, where justices are acting judicially; but it appears that the Licensing Authority gave effect to Mr. Marsland's objection. They, however, heard Mr. Costello for the objector on the objection taken by him as to the validity of

the proceedings taken in respect to the provisional certificate before the rescission of the resolution. The grounds of the objection are specifically stated in the first four paragraphs of the petition which was read at the hearing. So far as the evidence goes—no affidavit on that point having been filed for the Licensing Authority—they abstained from expressing any opinion on that objection; but a majority after inspecting the premises, granted the application. It is clear, therefore, that their attention was fully drawn to the objection raised to their jurisdiction. If they went wrong they did so with their eyes open and fully warned. On this statement of facts, then, the question that arises for decision here is whether the certificate for a licensed victualler's license granted to the respondent Cox was valid? This, in my opinion, depends upon (a) whether it must, for its validity, depend upon the provisional certificate granted to the respondent Anderson, or (b) whether it can be supported independently of the certificate? If it can, then, whether the provisional certificate was improperly granted or not, the validity of Cox's certificate will not be affected. If it cannot, then it will be necessary to determine whether the provisional certificate was valid or not. Now, the manner of obtaining a licensed victualler's license for premises possessing the accommodation required and completed and fit for occupation, and not already licensed, is prescribed by sec. 28. The mode of obtaining a provisional certificate for premises "not completed and fit for occupation at the time" is prescribed by sec. 33. The application under this section is to be made, and the procedure to be observed is the same as in the case of application for "new licenses," subsec. 2, sched. 4, form 5. If, however, the application is for a license for premises in respect of which a provisional certificate has been granted, the notices of application must state whether "now licensed or whether a provisional certificate has been granted in respect of it, and, if so, under what sign"—sec. 28 (a) (b), sched. 4, form 1. Now, Cox's notices of application were in the

form of sched. 4, form 1, and did state these particulars; and on the hearing of this application Cox's solicitor rested on the documents that I have mentioned, and in particular the provisional certificate which had been granted to Anderson in respect of the same premises, and the proceedings which I have already stated followed. The certificate was granted. It appears to me clear on the evidence that Cox's application was founded upon the provisional certificate, and that the Licensing Authority granted the certificate to Cox by the authority of subsec. 6 of sec. 33, and not as a certificate for a "new license" under sec. 28, which, though practically it comes to the same thing in the end, is yet evidently distinguished by the statute from a certificate under sec. 33, subsec. 6. This being so, can it stand without the support of the provisional certificate? The same procedure as required by the Statute was observed as on an application for a new license, with the exception I have mentioned—viz., the statement in the notices as to the granting of the provisional certificate—and the limiting of the objections to those mentioned in sec. 33, subsec. 6. It is contended, however, that Cox must rely on the provisional certificate, because by the course taken the objections specified in sec. 41—which would have been open on an application for a new license—were excluded by sec. 33, subsec. 6, and I think that is so because by sec. 40 objections may be made "subject to this Act," and if on an application for a certificate under sec. 33, subsec. 6 all the objections specified in sec. 41 are to be open, then the provisional certificate is valueless, and the imperative words in subsec. 6 of sec. 33—"shall be entitled to a certificate"—are rendered nugatory. I need hardly point out the injustice of such a construction; if, for instance, after the plans of a building have been approved of and certified—see sched. 7, form 3—and the building erected in accordance with them the question is to be re-opened. See also objection 5, sec. 41. To treat the references in the notices of application and the provisional certificate as so much surplusage on Cox's application,

and to say that they can be dispensed with is to ignore the provisions of the statute. If that can be done where is the necessity or the use of getting a provisional certificate. It would be a farce. I think that the publication in Cox's notices of the statement that a provisional certificate had been already granted for the premises was material, and that it was a representation that a valid provisional certificate had been so granted, and that such statement was calculated to mislead persons who would have been entitled to object under sec. 41 if the application had been for a new license. I think, therefore, that Cox's application was not an application for a new license, but an application for a certificate under sec. 33 subsec. 6, and that it, together with the provisional certificate, constituted a certificate for a licensed victualler's license with the meaning of sec. 124, or, in other words, that a provisional certificate is a conditional certificate for the sale of liquor which becomes operative when a certificate under sec. 33, subsec. 6 is granted in respect of it, and that if the provisional certificate is invalid, the certificate granted in respect of it under subsec. 6 of sec. 33 is also invalid. As, in my opinion, the validity of Cox's certificate depends on the validity of the provisional certificate, it becomes necessary to determine whether the latter is valid. Then is the provisional certificate valid? It is clear that Anderson's application for the provisional certificate was made and his notices published, and that the Licensing Authority entertained, heard, and adjourned the application, while the third resolution prohibiting the issue of new licenses in the area was in force. Sec. 124 enacts that "if the third resolution is adopted it shall not be lawful for the Licensing Authority, after receiving information thereof, to grant a certificate for a licensed victualler's license, &c. (with an exception not applicable here), and "any certificate granted contrary to the provisions of this section shall be null and void." The adjournment was on the 5th April, the resolution was not rescinded until the 1st of the same month. One case was cited at

the bar for the respondents on the question of adjournment—*Regina v. Pownall*, *Law Times* newspaper, June 17th last. It does not seem to me in point; nor, on examination, does *Ricketson v. Barbour* (1893), Ap. Ca. 194, a case to which I referred during the argument, help. The question must be determined on the construction of the statute, and the law to be applied, I think, is that which governs acts done in contravention of statutes, and contracts connected with illegal acts. When a statute prohibits an act, any contract made respecting the act prohibited is not only void but illegal (*Maxwell on Stat.* 432; *Bartlett v. Vinor*, Carth. 252; *Redpath v. Allen*, L.R. 4, P.C. 511). Now, a contract may be constituted by a number of acts, statements, or writings culminating in the complete contract. If an offer is made or an invitation is given to another to induce him to enter into a contract to do something prohibited by statute, that would be an illegal act. Again, to wilfully disobey a statute by doing any act which it forbids, and which concerns the public, unless the statute has provided some other penalty for such disobedience, is a misdemeanor at common law, and an attempt to commit a misdemeanor is itself a misdemeanor. *Stephen's Dig. Art.* 124, 59; *Archbold* 2, and cases there cited; *Maxwell on Stat.*, 494-5. It cannot be argued for a moment that the granting of a license for the sale of liquor is not an act affecting the public. If authority is wanting on the point, it will be found in *Rex v. Sainsbury*, 4 T.R. 445, where it was held that an indictment would lie against magistrates who, in violation of their duty as justices, had unlawfully granted, and to the same person, an ale-house license after other justices, who had concurrent jurisdiction, had refused it. Ashurst, J., with whom Buller, J., agreed, said, at page 457—"What the law says shall not be done it becomes illegal to do, and is therefore the subject matter of an indictment without the addition of corrupt motives." To apply this law to the present case, sec. 124 in distinct and express words prohibits the granting of a certificate for a licensed victual-

ler's license as long as the resolution remains in force, and it declares that any certificate granted contrary to the provisions of the section "shall be null and void." The statute provides no penalty for disobedience to this prohibition. If the Licensing Authority had in fact granted the certificate before 22nd April, they would have laid themselves open, possibly, to an indictment. They, however, did everything but grant the certificate. They allowed the application to be made, the notices to be given, and they exercised judicial functions (sec. 10) upon the application by hearing and adjourning it while the resolution was in force. It is quite clear to my mind that they deliberately adjourned the hearing to give Anderson an opportunity of obtaining a poll to rescind the resolution. I have come to that conclusion because I find no other reason for the adjournment. No reason appears in their notes; all that is there entered is "application adjourned for one month," for what, or on whose application, or whether of their own motion, is not stated. When they next sat the certificate of the Returning Officer declaring the rescission of the resolution was put before them; then they granted the provisional certificate. The inference seems irresistible that they knew on the 5th April that they had no jurisdiction to grant the certificate, and so gave the adjournment to see if meantime the resolution could be rescinded. This is very like what was recently attempted in the Royal Bank reconstruction, when Mr. Justice Harding was asked and refused to adjourn the hearing till Parliament had passed an Act to get over the difficulty, 5 Q.L.J. 83. The difference between that case and this is that his Honour had jurisdiction to adjourn, whereas the Licensing Authority had not. The impropriety of such a course as was taken here is beyond question. Now, there is a well known rule of construction of a statute, which is that it is the duty of a judge to make such a construction as shall suppress all evasions for the continuance of the mischief—*Magdalen College case* 11, rep. 716. To carry out effectually the object of a statute it must be so construed as to

defeat all attempts to do or avoid in an indirect or circuitous manner that which it has prohibited or enjoined.—Bac. Abr. Stat. J.—Com. Dig. Parlmt, B. 28. *Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud.* 2 Inst., 48—see *Maxwell on Stat.*, 133. Before a license can be granted all the prescribed preliminaries as to notices, time, etc., must be complied with. These things are part of the procedure, and are conditions precedent to the granting of the license, and the jurisdiction of the Licensing Authority, like that of any other judicial tribunal must be in existence at the date of the commencement of the proceedings. No application can be made nor notices given, nor time run, nor any prescribed act done, in respect of the license while the prohibition is in force. The jurisdiction of the Licensing Authority was suspended, and Anderson could not give lawful notice of his application, nor could the Licensing Authority lawfully receive it earlier than the 22nd April, the date of the rescission of the resolution, nor could the Licensing Authority lawfully hear the application until the next quarterly meeting after twenty-one days' notice of the application, which in this case would have been July, the earliest date at which Anderson could obtain his provisional certificate. The proceedings were, in my opinion, an ingenious but impotent attempt to evade the statute. The Licensing Authority acted without jurisdiction, and both the provisional certificate and the certificate for the license were in the words of the statute, "granted contrary to the provisions of the section" and "null and void." In the view I have taken of the first two grounds of the rule, I do not think it necessary to consider the third ground. It was taken for the first time on the application for the rule. Before holding that Mr. Missingham was so pecuniarily interested or otherwise biased in the matter as to have been incompetent to sit on 3rd May, when the provisional certificate was granted, I should require further evidence, further argument, and further consideration of the authorities, and of the question behind this, whether, assuming he were, the decision of the Licensing Authority,

which was on that day composed of six justices (including himself) was vitiated for that reason. I express no opinion on that point. Then ought the writ to issue? It was strongly urged for the respondents, especially Cox, that in this case the writ was not *ex debito justitiæ*, but discretionary on the ground that Lloyd was not a "party aggrieved" but only interested as one of the public and no more (*Reg. v. JJ, Surrey*, L.R. 5, Q.B. 466), and on that assumption to order the writ would be a hardship on Cox, who was an innocent party misled by, and relying on, the provisional certificate. If I thought that and had such a discretion I might be disposed to exercise it. It is, however, beyond question that Cox accepted the license with his eyes open, and with full notice of the objection to the provisional certificate. When that was brought to his notice he might have withdrawn his application and have made a fresh one for a new license, apart from the provisional certificate. Perhaps as all the objections in sec. 41 would have in that case been open, he did not care to risk that. He preferred to chance the provisional certificate, and must take his chance. So far as I am concerned it is unnecessary to decide the point. If I am bound to determine it I am prepared to hold that Lloyd is a party aggrieved. For these reasons, I think the writ should go, and I find sufficient authority for it in *Reg. v. Yaldwyn*, 3 Q.L.J. 144, where the Full Court granted against a Licensing Authority, on the application of a ratepayer and voter, the relief asked here. I think the order should be made absolute against all the respondents, and—excepting the Licensing Authority—with costs. The order should follow the order in *Regina v. Yaldwyn*—viz, to bring up the order which the Licensing Authority made for the issue of the certificates, and then the certificates, and that on their being brought up they be quashed by force of the rule without further order.

Jameson asked whether the order included the costs of the Crown.

COOPER, J.: Yes; the order is discharged with costs.

CHUBB, J.: The practice was here, and it had been in Brisbane, not always to ask for costs when applying for a rule *nisi*; but when issuing the order to insert "with costs" when costs were wanted. This point was discussed at the last sittings of the Full Court in Brisbane, and was held to be wrong. In future when counsel come to ask for a rule *nisi* they should ask for costs if costs are wanted. Magistrates need not appear unless costs are asked for against them in the rule.

From this order the appellants appealed to the Full Court at Brisbane.

King, for the appellant, contended that the Bench had no jurisdiction on 5th April, and should have dismissed the application. Proceedings should have been taken *de novo* on 3rd May. There was absolute proof that at the time he sat on the bench Missingham was in the employ of the person for whom the license was applied for, as he was the architect of a building adjoining the hotel, and which was for all interests and purposes part of the hotel. *R. v. Justices of Kent*, 44 J.P., 298; *Murphy v. Ithaca Divisional Board*, 3 Q.L.J., 86. The appeal should be upheld and costs given against the respondents and the justices.

Byrnes, A.G., and *Jodrell*, for the respondents *Anderson* and *Cox*, submitted that a provisional certificate was not a certificate for the sale of liquor at all. The mere form of the certificate could not be taken to override the plain meaning of the Act. The magistrates had power to adjourn the application as they could any other business. *Queen v. Pownall* (1893), 2 Q.B., 158. [GRIFFITH, C.J.: If they had no authority to entertain the application, could they adjourn it?] It was the absolute duty of the magistrates to entertain the application. *Queen v. Justices of Anglesea* (1892), 1 Q.B., 850; *R. v. Justices of West Riding*, 2 Q.B., 331. Missingham was not interested. All he did was to erect the outside walls of a building, inside which a public house was afterwards put. Otherwise any architect who drew plans would be disqualified.

Leeper, for the justices, opposed the application for costs, and submitted the justices should have their costs from the appellant, whatever the result might be.

King, in reply as to power of adjournment, cited *Paley on Summary Convictions*, 803; and *Queen v. Justices of Westmoreland*, L.R., 3 Q.B., 457.

GRIFFITH, C.J.: This was an application for a writ of *certiorari* to bring up, for the purpose of quashing them, two certificates granted by the Licensing Authority at Charters Towers—the first a provisional certificate granted on the 3rd of May, and the second a certificate founded upon it and granted on the 13th July—authorising the issue of a licensed victualler's license in respect of premises at Charters Towers. The notices of application for the provisional certificate were given for the 5th April, on which day the 3rd resolution under Part VI of *The Licensing Act of 1885* was in force in the area in which the premises are situated. On that day the licensing justices adjourned the application for a month. During the interval the resolution was rescinded by a poll of the ratepayers, and on the 3rd of May the application was considered and the provisional certificate was granted, three months being allowed to comply with the conditions imposed by the justices.

The rule was granted on the grounds (1) that on April 5th, when the application first came on for consideration, the justices had no jurisdiction to entertain it, and that they could not acquire any jurisdiction by an adjournment to a day when, as it turned out, the statutory prohibition was no longer in force; and (2) that one of the justices was disqualified by interest. The relator is a householder residing within half a mile of the premises in question, and was consequently entitled under sec. 40 of the Act to object to the grant of the license. In opposition to the rule, it was contended that the relator was not a person aggrieved who could claim a writ of *certiorari ex debito justitiæ*, and that, as this writ is not granted as of course, the Court would not act at

his instance. In answer to the objection of interest on the part of one of the justices, an affidavit was put in to which I will refer presently. It was also contended that, although sec. 124 of the Act forbids the granting of a final or definitive certificate for a license while the third resolution is in force, it does not forbid the grant of a provisional certificate; and further that, even if it does, yet, as the prohibition was not in force when the provisional certificate was actually granted, the notices might be considered as given for the later date, and that the certificate was therefore valid. On the argument at Townsville, Cooper, J., was of opinion that the prohibition in sec. 124 did not extend to provisional certificates, and further that, if it did, the relator was not entitled to the writ *ex debito justitiæ*, and that it ought not to go on his application. Chubb, J., was of a contrary opinion on both points, and thought also that the justices had no greater power on the day to which the application was adjourned than they had when it first came before them. As to the objection on the ground of interest, Cooper, J., thought that it failed. Chubb, J., was not prepared to decide it without further evidence and argument. In this difference of opinion the judgment of Cooper, J., as the senior judge, prevailed, and the rule was discharged. I am of opinion that a person who has under the Act a statutory right to be heard as an objector before the Licensing Authority upon an application for a license is in a position analogous to that of a party to an action, and is entitled to be heard in this Court for the purpose of making any objections that this Court can entertain to the validity of the proceedings before the justices. I think also that he has a special interest as distinguished from the general interest of all Her Majesty's subjects (*R. v. Justices of Surrey*, L.R., 5 Q.B., 466). I think, therefore, that this answer to the application fails.

A more important question is the jurisdiction of the licensing justices to deal with an application for a provisional certificate while the 3rd resolution is in force. On this two points arise—

first, whether the justices had jurisdiction on the 5th of April, and secondly, if they had not, whether they had jurisdiction on the 3rd of May to deal with the adjourned application. I infer from the judgments of both the learned judges at Townsville that the question was presented to them as one of illegality rather than as a question of mere invalidity or nullity. I am disposed to think that it is not necessary to regard it in this light. It is sufficient if the act of the justices was unauthorised by law. I would observe also that the term "jurisdiction" appears to me to have been used in the course of the case in different senses. In one sense licensing justices have jurisdiction to entertain any application for a license. They are the only tribunal to which the application can be made. And, if an application comes before them which for any reason they cannot lawfully grant, they have authority to refuse it. So, if a question arises whether the grant of an application is warranted by law, they have authority to inquire into that question. But their jurisdiction, using the term in this wider sense, although it is exclusive, is limited and trammelled by the statute. And if in the attempted exercise of their jurisdiction they exceed the appointed limits, their act is invalid. This is sometimes called acting without jurisdiction or in excess of jurisdiction. The real question for consideration is whether what they did was authorised by law. Had, then, the justices authority on the 5th of April to entertain and grant an application for a provisional certificate? The answer to this question depends on the construction to be put on sec. 124 of *The Licensing Act*.

There are certain well known and recognised rules for the interpretation of statutes by which in my judgment this Court is as much bound as by *The Acts Shortening Act* or the rules of grammar. It is, I think, to be assumed by the Court that the Legislature is aware of these rules, and that in framing Acts of Parliament it acts on the corresponding assumption that this Court equally recognises and acts on them. I know that in practice the Legislature does act on that

assumption. If the same rules are not followed by the framers and the interpreters of the law, nothing but confusion can result. A rule which has been called the "golden rule" is thus stated by Parke, B., in *Perry v. Skinner*, 2 M and W., at page 476: "The rule by which we are to be guided in construing Acts of Parliament is to look at their precise words and to construe them in their ordinary sense unless it would lead to any absurdity or manifest injustice, and, if it should, so to vary and modify them as to avoid that which it certainly could not have been the intention of the legislature should be done." The same very learned judge stated the rule in practically the same terms in the case of *Becke v. Smith* (2 M. and W., 195), and again when Lord Wensleydale, in the case of *Gray v. Pearson* (6 H L., 106; 26 L.J., Ch., at p. 481). The canon of construction adopted by the House of Lords in the *Sussex Peerage Case* (11 Cl. & F., 143), is: "The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament that passed the Act. If the words of the statute are in themselves precise and unambiguous, no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such cases best describe the intention of the lawgiver, but if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention to call in aid the ground and cause of making the statute." Lord Esher, M.R., in the case of *R. v. Judge of City of London Court* (1892, 1 Q.B., 273), says, at p. 290: "In my opinion the rule has always been this—If the words of an Act admit of two interpretations then they are not clear, and if one interpretation leads to an absurdity, and the other does not, the Court will conclude that the legislature did not intend to lead to an absurdity, and will adopt the other interpretation." He goes on to point out that this does not mean that when the meaning of general words is (if you look at them by themselves) clear, that determines their construction

at once, if from other parts of the Act it appears that they were intended to have a different meaning. In my opinion the Court will not be astute to discover an ambiguity, and *a fortiori* will not do so merely to find a possible interpretation which would lead to an absurdity. Again: "When words are capable of a twofold construction, whether in deeds, or wills, or statutes, the rule is to adopt such an interpretation *ut res magis valeat quam pereat*; 'but this,' says Story, 'is a mere rule of common sense'" (*Dwarris on Statutes*, 568).

This I understand to mean that in cases of ambiguity that construction will be adopted which will further the manifest intention of the Legislature. I proceed to apply these rules to the interpretation of sec. 124. Some other subsidiary rules I will refer to afterwards. And first as to the intention of the Legislature. *The Licensing Act* establishes a tribunal called a Licensing Authority for the purpose of dealing with applications for licenses for the sale of liquor. In the case of licensed victuallers' licenses they are required to take into consideration two different matters—(1) the suitability, both as to locality and construction, of the premises in respect of which the license is sought, and (2) the personal fitness of the applicant to be the holder of a license. If the premises are already in existence both matters are considered together, and, if the Licensing Authority are satisfied, they grant to the applicant a certificate which without more entitles him to obtain a license from the Treasurer (sec. 51). If the premises are not completed, the matters of the suitability of the premises as to locality and also the suitability as to the proposed mode of construction, are first decided (sec. 33); and, if they are decided in favour of the applicant, a certificate is issued, which finally concludes these matters. The question of the fitness of the applicant stands over for a further application made on the completion of the premises, when, if the bench are satisfied of his fitness, they issue a further certificate, which entitles him to a license (*ib.*) It appears, there-

fore, that a licensed victualler's license may be issued in pursuance either of one decision of the Licensing Authority or of two separate decisions made at different times. In either case the decisions are embodied in and evidenced by certificates. There may thus be two certificates in the case of a license of this kind, or one only. If there are two, the final one is in form the same as if there were only one, but it is based upon and derives its existence from the former. I turn now to Part VI of *The Licensing Act*, in which sec. 124 occurs. This is a separate part of the Act dealing with a single subject—commonly called "Local Option." The intent of the Legislature is plainly expressed to be to allow the sale of intoxicating liquor to be controlled by the ratepayers. They may, by a poll taken in the prescribed manner, ordain as to the area affected by the ordinance (which is called a resolution), that the sale of liquor shall be altogether prohibited, or that the number of licenses shall be reduced to a specified number, or that no new licenses shall be granted. The resolutions themselves are couched in ordinary language, and no ordinary person can fail to understand their intention. What is the meaning of saying that no new licenses shall be granted? Without the aid of any formal rule of construction, I should suppose the meaning to be that, as no new licenses can be granted, applications for them, which would be futile, are not to be entertained, and that the whole business of applying for and granting licenses is to stop. There is, however, a recognised rule of construction, cited by Chubb, *J. Quando aliquid prohibetur, prohibetur et omne per quod pervenitur id illud*, which is, I think, like another already quoted, a mere rule of common sense. If this rule applies, the meaning which I should attach to the words is not only the apparent but the necessary meaning.

The intent of the Legislature being thus expressed, the Act goes on to state in formal language how effect is to be given to the ordinances of the ratepayers. Sec. 124 deals with the case of the 3rd resolution, and provides that if

that resolution is adopted it shall not, while the resolution is in force, be lawful for the Licensing Authority, after being informed of it, to "grant a certificate for a licensed victualler's license or wine-seller's license to any person for the sale of liquor in any house or premises within the area" which is not already licensed, and that any certificate granted contrary to the provisions of the section shall be null and void. I proceed to inquire what is the plain, ordinary meaning of these words, and whether they are precise and unambiguous, and, if they are ambiguous, which interpretation is most in accordance with the plain intention of the Legislature as expressed by the context, and whether any of the suggested interpretations leads to an absurd result. The ordinance to which effect is to be given is "that no new licenses shall be granted." As licenses are granted as the result of applications to the Licensing Authority, the prohibition is naturally addressed to that authority. If this were all that had to be considered, the section might have run, "It shall not be lawful to grant a license to any person." This prohibition would, however, be too large, as it is not intended to apply to all kinds of licenses, or to all localities under the jurisdiction of the Licensing Authority. The licenses intended are for the sale of liquor, and do not include billiard licenses. Thus we get the words "for the sale of liquor." Again, it is not intended to include packet licenses: hence the further limitation, "for a licensed victualler's license or wine license." There remains the limitation as to area and to houses not already licensed. Hence the words "in any house or premises unless, &c." The Licensing Authority does not, however, grant licenses but certificates for licenses. The prohibition is therefore made to read: "It shall not be lawful . . . to grant a certificate for a licensed victualler's license, &c."

The same result will be arrived at if we consider the sentence as built up from the beginning. "It shall not be lawful to grant a certificate for," not any kind of licenses, but "a licensed victualler's license or wineseller's license," as

distinguished from packet licenses and billiard licenses, "for the sale of liquor in any house or premises within the area, unless, &c." The use of the words "for the sale of liquor" to connect the word "license" with the words describing the premises to which it extends is natural, both because licenses are, in fact, for the sale of liquor, and because they authorise it in so many words.

This seems, then, to be the ordinary and natural construction of the section. It is suggested, however, that the words "for the sale of liquor" are grammatically an adjectival qualification of "certificate."

For the reasons given, I think that they are merely words of conjunction connecting "license" and "house or premises," and, together with these latter words, forming an adjectival qualification of the word "license." So far, then, I am unable to see any difficulty in the construction of the words used. What is prohibited is the grant of a certificate for a licensed victualler's license or a wineseller's license. Nor, so far, can I see any ambiguity. The next step is to inquire what is a certificate for a licensed victualler's license, and to see whether the inquiry raises any ambiguity. For this purpose it is necessary to refer again to the sections of the Act dealing with applications for licenses. When an application for a license is finally granted, a certificate is to be issued "in such one of the forms in the fifth schedule" as is appropriate, on receipt of which the Treasurer is to issue the license authorised by it (s. 51). The form appropriate to a licensed victualler's license is the first form. When a provisional certificate is granted, then, upon the performance of the conditions specified in it as to the building, and on application by the holder or any other person within the time limited by the certificate, the licensing authority is bound to grant a certificate "for a license in the first form in the fifth schedule" (sec. 33, subsec. 6), unless the applicant is an unfit person.

There are, therefore, two kinds of certificates which may be issued in the case of licensed victuallers' licenses, which are described respec-

tively as "a certificate in the first form in the fifth schedule" and "a provisional certificate." In the case of a wineseller's license there is only one. The question to be answered is: "Is a provisional certificate a certificate for a licensed victualler's license, within the meaning of sec. 124." It certainly is a certificate, and it is a certificate tending or looking to a licensed victualler's license. Unless, therefore, the words "for a licensed victualler's license" are intended to exclude a provisional certificate, granted with a view to a licensed victualler's license, the section literally applies. What reasons can be suggested for such an exclusive meaning? In section 33, where both kinds of certificates are referred to in contradistinction to one another, the one is called a provisional certificate and the other "a certificate for a license in the first form in the fifth schedule." If any inference is to be drawn from this language it certainly is not that a provisional certificate is not a certificate for a licensed victualler's license. It is suggested that the certificate intended is described as a certificate for the sale of liquor, and that a provisional certificate is not a certificate for the sale of liquor. I have already dealt with that argument, but conceding, for a moment, that the grammatical construction of the sentence permits such an interpretation, I ask what is a certificate for the sale of liquor and where is it elsewhere referred to. I cannot find that the term is anywhere used in the Act. There are, however, some certificates that may be granted under the Act, which, in terms, authorize the sale of liquor. These are certificates for the transfer of a license from one person to another; certificates for the removal of a license from one house to another; certificates authorizing a licensee to sell liquor in temporary premises when the licensed house is destroyed by fire or tempest; and certificates for carrying on the business in the event of the death, insolvency, or insanity of the licensee. All these, however, authorize the sale of liquor by virtue of a subsisting license, and are in no sense "certificates for a license." But if the term "certificate for

the sale of liquor" has any meaning, it would naturally apply to one of them. This meaning is, however, excluded by the context. A certificate granted in respect of existing premises, on the other hand, does not purport to authorize the sale of liquor, and cannot, for any reason that I can apprehend, be properly described as a certificate or the sale of liquor, any more than a provisional certificate can be so described. The term may, no doubt, be applied in an inexact sense to both kinds of certificates, inasmuch as both lead to the authorization of the sale of liquor. Moreover, if the words "for the sale of liquor" are to be used immediately with the word "license," as words of qualification or limitation, they must be so used after that word in both places, in which case we should get "a certificate for a licensed victualler's license for the sale of liquor, or a certificate for a wineseller's license for the sale of liquor." In the second member of the sentence, these words would be tautological and meaningless.

It must be contended that the words "a certificate for a licensed victualler's license or wineseller's license for the sale of liquor in any house," &c., are equivalent to "a certificate for a licensed victualler's license in the first form in the fifth schedule, or a wineseller's license, in respect of any house," &c. Surely this is not the ordinary or natural construction of the words.

I am unable to see why, there being documents which the expression (if it is to be found in the section) would properly and accurately describe, but to which it clearly does not refer, it should, by a forced construction, be made to refer to another class of documents which it does not accurately describe, and to which no reference is to be found except by adopting that forced construction.

On the other hand the ordinary grammatical meaning of the term "certificate for a licensed victualler's license" appears to be a certificate conducive to (Johnson) or leading to (Imperial Dictionary) a license, or a certificate, the effect of which, if valid, would be to authorize the grant of a license. And, there being two kinds of such certificates, why should the meaning of the word

certificate be limited to one of the two kinds? It appears to me that the most that can be said for the contention is that the term "certificate for a licensed victualler's license" may be ambiguous, and that, although it is a general term, it is possible that it only refers to one of the two kinds of certificate. Conceding, for the sake of argument, that this ambiguity, which is in my opinion only raised by a forced construction of the language of the section, really exists, and applying the rules applicable to such cases, I ask which of these constructions will give effect to the plain intention of the Legislature? Will either of them lead to an absurd result? I have already shown that a provisional certificate is a conclusive decision as to the suitability of the premises. The authority of the Licensing Bench in dealing with the second application is thus limited, part of that authority having been already finally and conclusively exercised by the bench when it granted the provisional certificate. The authority which remains is of an almost formal character, being limited to seeing that the conditions already prescribed by the Bench as to the building have been complied with, and that the applicant is of good character. It seems to me to be plain that in such a case the substantial judicial authority of the Licensing Bench is exercised and exhausted by the provisional certificate, and that the final certificate is in substance granted then, and not on the second application when their power is limited to dealing with matters of formal proof.

The provisional certificate is, in substance, and very much in form, "a certificate for a license" to come into effect upon the performance of conditions subsequent, not depending in any way on the bench which formally declare that effect. If the opinion of Cooper, J., is right, a bench which admittedly cannot grant a final certificate for a license, can nevertheless, by a judicial act, effectually compel it to be granted at a future time. What is the difference in substance between adjudging a thing to be done now, and adjudging finally and without appeal that it shall be done at a future time upon the happening of a contingent event?

Observe the extraordinary results that would follow from giving effect to this contention. S. 124 forbids the licensing justices to grant a certificate for a license so long as the 3rd resolution is in force. If they may nevertheless grant provisional certificates, they may begin to do so immediately after the passing of the resolution, for the prohibition is as effectual, and their power is as extensive, at one period of its operation as at another. And although the law has declared that no new licenses are to be granted in the area, they may go on declaring, in effect, that licenses ought to be granted, and shall be granted, if the resolution ceases to have effect. They may make such decisions in respect of an indefinite number of premises. And this power may be exercised so as to bring their decision into effect at any future date (provided that the resolution has in the meantime been rescinded) when they may no longer be licensing justices, and notwithstanding that the Licensing Authority of that day may think that the license should be refused.

Moreover, during the operation of the third resolution, the Licensing Authority, having no power to grant a final certificate for a license, has no real sense of responsibility. It can only deal, if it can act at all, with a hypothetical state of things which may or may not come into existence. I have always understood that two of the essential conditions of a binding judgment of any court are the existence of real parties and a real existing *lis*. This Court declines to deal with hypothetical cases; I think that inferior courts have no power to do so in the absence of express statutory authority, and that if an application is made to an inferior court for what is in effect a judgment that in the event of some event happening in the future, the happening of which is quite uncertain, the applicant shall be entitled to certain rights, the Court has no jurisdiction to give any such judgment. What would be thought of an action in this Court for a declaration that when an Act of the Legislature is repealed the plaintiff will be entitled to an estate?

Suppose the power of this Court to make a

decree for a divorce were suspended by statute, could the Court during the suspension of this power make a valid decree *nisi*? If not, why not? I cannot see any distinction in principle between such a case and that now under consideration.

I think that something more than an ambiguity must be shown before the Court can hold that the Legislature intended a result which appears to me so absurd. And, if the ambiguity exists, I think that the absurdity of this result plainly indicates that the interpretation which would lead to it is to be rejected.

For all these reasons I am of opinion that the words "certificate for a licensed victualler's license" in sec. 124 include a provisional license.

Apart, however, from the mere question of verbal construction, and assuming the actual words not to include such a license, I am of opinion that the maxim "*quando aliquid prohibetur, &c.*," already cited, and the rules that a Court will not use a power which it has for the purpose of indirectly exercising a power which it has not (*Per* Pollock, C.B., in *Attorney-General v. Bovet*, 15 M. & W., at p. 71), and that what cannot be done *per directum* shall not be done *per obliquum* (*Per* Kenyon, C.J., 8 T.R., 301), irresistibly lead to the conclusion that while the 3rd resolution is in force the Licensing Authority is prohibited, by necessary implication, from giving any judgment or doing any judicial act which would, if valid, operate either then or at any future time to confer on any person a right to a certificate which they are themselves prohibited from granting. To apply the words of Lord Northington (quoted by Buller, J., in 2 T.R., at p. 252): "If these modifications are to be allowed, as the law is a system of wisdom it would allow it by direct limitation, but to say this cannot be done by direct limitation, and yet to say the thing may be done by I know not what magic, would make it a system of puerility and jargon." For these reasons I am of opinion that on the 5th of April the Licensing Bench had no authority to entertain or grant an application for the provisional license.

I have dealt with this point at some length, because it appears to me that the contrary opinion reduces the Local Option provisions of the Act to an absurdity, and also from respect to the opinions of my brother judges who differ from me. I unfeignedly regret that there should be such a difference of opinion on the construction of this statute. "I have endeavoured," to use the words of Lord Westbury (*Re Mew & Thorne*, 31 L.J., Bankruptcy, at p. 88), "as far as it is possible for one who wrote the words, and knew the meaning he intended to convey, to divest my mind of all impressions received from the past, and to consider the language as if it were now presented to me for the first time," but I have been unable to bring myself to doubt that the meaning of the Legislature, as expressed in the words of the Act, is as I have interpreted it. Indeed, I did not understand the contrary construction to be seriously urged at the Bar, although I believe it has commended itself to my learned brothers.

I have had more difficulty on the question whether, the resolution having been, as it happened, rescinded before the 3rd of May, the Bench could then act on the notice of application given for the 5th of April, a day on which they could not act on them.

But if the view that the Bench on the 5th of April had no jurisdiction to entertain the application—*i.e.*, could not do so without disobeying the law—is correct, I do not think that they could put themselves in a more efficient position by an adjournment (*R. v. Justices of Oxfordshire*, 1 M. & S., 448).

The case of *R. v. Pownall* (1893) 2 Q.B. 158, and the cases which it followed, turned upon the language of a section substantially the same in terms as sec. 28 of *The Licensing Act*.

It was held that, having regard to the other facts shown to the Court as to the manner in which licensing business was ordinarily conducted, the expression "twenty-one days before applying for a license," must be taken to mean twenty-one days before the day on which the application was actually made. I do not think that these decisions

apply to a case where, on the day for which the notice is given and when it is adjourned, the Bench are prohibited by law from entertaining it. I think, further, that the true construction of sec. 124 of *The Licensing Act* is that, while the third resolution is in force, the whole jurisdiction of the licensing authority with respect to the granting of new licenses is suspended, and that any proceedings taken with a view to the exercise of that jurisdiction are, so to say, *coram non judice*. No one was bound to pay any attention to them or to put in any objection. It follows, in my judgment, that the provisional certificate granted on third May was invalid.

When the further application came before the licensing authority, it was sought to raise objections on several of the grounds specified in section 41, amongst others, an objection to the character of the building, and the objection that the requirements of the locality did not justify the grant of the license. The Bench, however, held that they were precluded by the provisional certificate from entertaining these objections. And in this, I think, they were right, if the provisional certificate was valid. This circumstance shows that in substance though not in form the license was granted on the first application and not on the second.

I proceed to deal with the objection of interest on the part of one of the justices who granted the provisional certificate.

The material facts are as follows:—The building, of which the licensed premises form part, is a large oblong wooden building, 140 feet long by 56 wide, constructed for the purposes of a theatre or public hall. At the end furthest from the street there is a stage which occupies 34 feet of the length. The gallery of the hall extends from the street front for a distance of 26 feet. The space underneath this gallery, which is divided by wooden partitions into rooms, forms the premises in respect of which the license was granted. The name of one of the justices, Mr. Missingham, who is also Mayor of Charters Towers, and *ex officio* a member of the Licensing

Authority, appears on the plan of the hall in such a manner as to indicate that he was concerned in its erection as draftsman or architect. The owner of the premises is William Gough. He and Missingham have made a joint affidavit from which it appears that Missingham was employed by Gough to superintend on his behalf the erection of the hall.

They say that Missingham was not employed as draftsman of the building to be erected in accordance with the plans, &c., referred to in the provisional certificate, except as to the outer walls; that he had nothing to do with the preparation of the plans for the licensed premises; and that, except as to the outer walls of the licensed premises, which are said to be a continuation of the walls of the hall and had to be erected as part of those outer walls, irrespective of any granting of a license, he had nothing to do with the licensed premises. They also say that the outer walls of the licensed premises were furnished before the grant of the provisional certificate, and that the contract for the licensed premises was separate from that of the hall. As, however, all that had to be done with regard to the licensed premises, inside the outer wall, was to put up some wooden partitions and fittings, I understand the reference to be to that work. I cannot dissociate the space under the gallery from the rest of the building. The whole seems to have been a single enterprise, the theatre being the principal and the licensed premises a mere accessory.

One of the principal questions for the consideration of the Licensing Authority on the application for a provisional certificate was the suitability of the building for a licensed house. It is clear that they could not have required any alteration in it without disturbing the dimensions and arrangements of the hall, and that Gough was materially interested in getting a favourable decision on that point. At the time of the application Missingham was employed by him for the purpose of superintending the erection of the hall. Under such circumstances can Missingham be considered to have been an independent and

unbiased person capable of acting judicially in the matter of considering the suitability of the building, or was he disqualified?

Apart from his position as a member of the Licensing Authority, what was his duty to Gough? To see the building erected in accordance with the contract plans and specifications, and in the event of any alterations being made, to see that they interfered as little as possible with contract designs, and were carried out with as little expense as possible to his employer. And this duty continued as long as his employment existed, that is, until the building was finished.

What was his duty as a member of the Licensing Authority? To disregard all those considerations, and look only to the interests of the public. It is clear that no alteration in the structure of the premises proposed to be licensed for the purpose of securing better ventilation or greater privacy for lodgers could have been required by the Licensing Authority without involving serious structural changes in the hall, and possibly large expense to Gough. And the nearer the approach to completion the greater would be the expense of any alterations. "Every person having a personal interest in any litigation, or having a direct or indirect motive for desiring a particular decision to be come to, should abstain from putting himself in such a position as that, unconsciously to himself, a bias adverse to the administration of justice might take possession of his mind." (*R. v. Justices of Great Yarmouth*, 8 Q.B.D., 525).

This principle is acted upon, as pointed out by the Court in that case, in dealing with the relations of principal and agent, and applies equally to the administration of justice. In *R. v. Justices of Cumberland* (58 I.T., 481) the rule is thus stated by Mathew, J.:—"The rule of law is that when a magistrate takes such a real interest in the subject matter of the litigation as to make a real bias reasonably probable, he is disqualified from sitting as a magistrate." In the present case it appears to me that Missingham's duty to his employer conflicted, as long as his employment lasted, with his duty to the public, and that a

real bias was therefore, to say the least, reasonably probable. Put the question in its simple form. Is a foreman of works of a hall or a theatre an independent judge on the question whether part of the building should be used as an hotel without alteration of the plan? The question answers itself. The disqualification being then shown to have existed at one time, I think that the burden of proof of its cessation before the 3rd of May is upon the respondents. I read Missingham's and Gough's affidavit as carefully avoiding to state that his employment in connection with the hall had ceased before that day. It follows that the decision of the Bench, of which he was a member, cannot stand, for the Court cannot discuss how far he may have influenced the other justices (*R. v. London County Council*, 1892, 1 Q.B., 190), and that the grant of the provisional certificate was invalid on this ground also.

And as the application for a license on the 18th of July was founded upon the provisional certificate, and objections which might, if it had been an original application, have been urged against it, were consequently excluded, I think that the certificate of 18th of July must fall with the provisional certificate. For these reasons I am of opinion that the appeal should be allowed, and that the rule *nisi* for a *certiorari* should be made absolute to bring up and quash both certificates.

HARDING, J.: I regret that I am unable to agree with the judgment of the learned Chief Justice. This is a matter which comes on by motion made by Mr. King on behalf of William Johnson Lloyd by way of appeal against the order made by the Full Court at Townsville on the 16th October, 1893, discharging a rule *nisi* for a *certiorari* which had been granted by Mr. Justice Chubb, and made returnable before the Northern Full Court. The judgment of Mr. Justice Cooper gave the facts upon which the question of the jurisdiction of the licensing magistrates had been raised. About four years ago the residents of a certain area in Charters Towers adopted the 3rd resolution of the Local Option

clause of *The Licensing Act*, and therefore for the last two years that resolution had been liable to be rescinded, and was actually rescinded on the 22nd April last. On the 15th March the respondent Andrew Harper Anderson gave notice of his intention to apply before the next ensuing quarterly meeting of the justices for a provisional certificate for certain premises not then completed or erected, which he wanted to occupy as a public-house. On the 5th April the licensing justices adjourned the application for a month, and on the 3rd May issued a certificate. Now, *The Licensing Act of 1885*, 49 Vic., No. 18, constitutes a licensing authority; sec. 6 provides the mode of exercising its jurisdiction; sec. 11 provides for the holding of quarterly meetings for the consideration of applications for licenses and certificates; sec. 14 provides for the keeping by the clerk of petty sessions of a register of all licenses and certificates granted; sec. 23 provides that licenses under the Act shall be of four kinds—(1) licensed victualler's license, (2) wineseller's license, (3) packet license, (4) billiard or bagatelle license. It does not mention the certificate for provisional license. Secs. 24 to 32 relate to the mode of obtaining, renewing, transferring, and removing licenses. The only one of these sections which mentions certificates is the 27th, which provides that nothing in secs. 25 and 26—the sections relating to the accommodation in the house—shall affect a provisional certificate granted before the Act, if the previous standard of accommodation is maintained. Sec. 33 introduces "provisional certificates." Upon that section I remark that provisional certificates may be for premises to be erected (of which alone I am speaking); that the mode of obtaining them is provided for by a distinct procedure; that conditions may be annexed to the grant; that the holder of such a certificate may, on proof of performance of its conditions, apply and is entitled to obtain a certificate for a license in form 1, schedule 5. This certificate for a licensed victualler's license is a very different thing from a provisional certificate. The real virtue of the provisional certificate is

that if premises in accordance with it are erected at the time of application, and if a fit person applies for a licensed victualler's license, such a license is to be granted—that is to say, if it legally can be at the time of application; and, to my mind, there turns the whole gist of the case. The license is to be granted if it legally can be. This depends upon the application of Pt. VI of the Act relating to Local Option sections, secs. 114 to 126. Sec. 115 provides for the passing of a resolution in the following words: "That no new licenses shall be granted." Sec. 124 provides the consequences accruing on its passing. The section is as follow: "If the 3rd resolution is adopted, it shall not be lawful for the Licensing Authority, after receiving information thereof, to grant a certificate for a licensed victualler's license or wineseller's license to any person for the sale of liquor in any house or premises within the area, unless at the time of adoption of such resolution a license was current and in force for the sale of liquor in such house or premises, and any certificate granted contrary to the provisions of this section shall be null and void." Thus the section only forbids the granting of a certificate for a licensed victualler's license or wineseller's license for the sale of liquor. It says nothing expressly or impliedly about a "provisional license." Consequently it does not forbid its being granted during the continuance of the 3rd resolution. If a "provisional license" has been granted, the consequence of this section is that a certificate for a licensed victualler's license cannot legally be obtained in respect of it during the continuance of the resolution, which is the position in the present case. I am consequently of opinion that, under the circumstances and the facts which I stated in the opening of my judgment, there was jurisdiction in the justices at the time they granted the license or certificate for the sale of liquor. There was jurisdiction in them to adjudicate upon the application supported by the previous provisional certificate, the 3rd resolution then not being in existence. On the question of Missingham's supposed interest in the granting of

the license I entirely join issue. The premises which he had supervised had been let by William Gough, the owner, to the applicant for the license. There is nothing to show that the tenancy was not one in which there were the ordinary relations between landlord and tenant. There is nothing to show that the tenancy depended upon the granting or non-granting of the license. The landlord must, therefore, be presumed to be indifferent, and, that being so, it cannot be said that Missingham, who had been employed simply to supervise the erection of the building, had any interest which disqualified him from sitting on the Licensing Bench. I think, therefore, on the ground of interest the appeal entirely fails. On all the grounds that I have mentioned I think that the judgment of the Northern Court must be upheld.

REAL, J.: I also regret that I am unable to agree with the judgment of the Chief Justice. The Act is an encroachment on the common law right of all persons to buy and sell what they please, and therefore it must be strictly construed according to the wording of the different sections. Taking that as my guide in the construction of the sections relating to the issue of certificates, I hold that the Act prohibits only the issue of certificates for a licensed victualler's license. As the 3rd resolution of the Local Option clauses of the Act was not in force when the certificate for a licensed victualler's license was granted, the Licensing Authority was not prohibited from granting a certificate for the sale of liquor. The certificate was therefore a valid one. On that point the appeal must fail. On the question of the interest of Missingham, I agree with the law as laid down by the learned Chief Justice, but I take a different view on the facts. I think that the relator has not shown conclusively that Missingham was interested, and as the Court always presumes in favour of the innocence of accused persons, the appeal must fail on that ground also.

Appeal dismissed with costs.

Solicitor for relator: *A. Down*.

Solicitors for respondents: *Hellicar*, agent for *Marsland & Marsland*.

ECCLESIASTICAL JURISDICTION.

GRIFFITH, C.J.

18th November, 1893.

Re the Lands and Goods of MARY LOUISA ARCHER. Administration—Appointment of Company during Administrator's Absence—Rescission of Appointment—Costs.

Upon the application of A., the administrator of an estate, who was desirous of leaving the colony for a time, an order was made purporting to appoint the Union Trustee Company, Limited, administrators in his place. On his return an application was made to rescind the previous order, A. wishing to resume administration.

Held, that the Court had power to give leave to A. to rescind the appointment, but that A. must pay the company's costs.

An appointment under sec. 13 of *The Union Trustee Company of Australia, Limited, Act* (54 Vic.) is revocable with the consent of the Court.

MOTION for the rescission of an order of the Court made on June 22, 1892, appointing the Union Trustee Company, Limited, as administrators of the lands and goods of the late Mary Louisa Archer, in place of Archibald Archer.

Mr. A. Archer was administrator of the lands and goods of Mrs. Archer, who, with her husband, was lost in the Quetta disaster. Wanting to visit England, Mr. Archer applied under sec. 13 of *The Union Trustee Company of Australia Limited Act* for the appointment of that company to act in his place during his absence. The Court consented to the appointment in the terms of the Act. Archer, having returned to Queensland, now wished to resume the administration of the estate. He had no fault to find with the company, but simply wished to get control of it again. The order of the Court had been taken out as appointing the company to act in place of Mr. Archer; but it should have been taken out as appointing them to perform all the acts and duties of administrators.

Lilley for applicant. *Mansfield* for the Union Trustee Company.

Lilley: If the Court has no power to rescind the previous order, it can stay the powers of the company under the order. Mr. Archer desired to terminate the company's agency. As the appointment was made with the consent of the Court, the

Court is entitled to know that he wishes to revoke it.

Mansfield said the company did not wish to oppose the motion, but they felt a doubt as to whether the Court had any right to rescind the order. As a matter of fact the appointment went further than it had any right to do. The Act itself did not contain any provision for removal under such circumstances. *In the goods of Sarah Reid*, 11 P.D., 70, it was held that the administrator having once acted could not resign. The company were entitled to protection in anything that they had done, and were entitled to have their costs paid.

Lilley contended that the company could not get a release from Mr. Archer, but would have to put in their accounts in the ordinary way. Costs should come out of the estate.

GRIFFITH, C.J.: I think that the order in this case must be heard as an order consenting to the appointment of the Company to discharge the duties of administrator. It is a rule of the Court that an administrator once appointed will not be removed except for very serious cause. In some cases, however, persons who have taken upon themselves the burden of administering estates, are anxious to get rid of the responsibility, and one of the objects of the establishment of such companies as these was to enable them to do so either before or after they have accepted the administration. Sec. 13 of the Act was, I think, intended to apply to the case of an administrator or executor desiring to get rid of the administration after accepting it. The question has been very properly raised by Mr. Mansfield whether such an appointment is revocable. I think it is convenient that it should be revocable. The appointment of an agent by a principal is ordinarily revocable, and I do not know any reason why an appointment of this kind should not be revocable. I think I am free to adopt the construction I think most beneficial, in the absence of any words indicating that an appointment is not to be revocable. I, therefore, come to the conclusion that the appointment is revocable with the consent of the Court.

I have no power to rescind an order giving the approval of the Court to an act, when that order has been acted upon. I have, however, I think, power to give leave to revoke the appointment, and as it was the administrator who made the appointment, I think he is the person to revoke it. I will therefore make an order giving leave to Mr. Archer to revoke the appointment of the company. I do not think it is necessary for me to give any special directions as to passing accounts, but will give leave to apply. The company are entitled to their costs, but as the appointment was made for Mr. Archer's convenience, they ought not to come out of the estate. I will therefore allow the company their costs of the application as between solicitor and client, and direct them to be paid by Mr. Archer.

Solicitors for applicant: *Rüthning and Jensen*.

Solicitors for company: *Hart, Flower and Drury*.

IN CHAMBERS

REAL, J.

27th November, 1893.

Re the Will of M. A. ATKINSON.

Probate—Will of married woman—Separate estate—54 Vic., No. 9, ss. 3, 7, 8, 14—Policy of Assurance.

A wife devised all her real and personal property, including a policy of assurance, to her husband, and appointed him executor of her will. The Registrar refused to grant probate.

Held, that the husband was entitled to probate, and that evidence of separate estate was unnecessary.

APPLICATION for probate of the will of Mary Ann Atkinson to be granted to her husband, P. C. Atkinson, the executor mentioned in the will.

M. A. Atkinson died on 7th October, 1893, leaving a will bearing date the 12th day of May, 1893, by which she devised all "my real and personal estate, including the two hundred pounds payable after my decease by the A. M. P. Society under policy," to her husband, and appointed him sole executor.

The Registrar refused to grant probate on the grounds that it did not appear by the affidavits

either (1) that the will was made in the exercise of a power; or (2) that she had married after the passing of *The Married Women's Property Act, 1890*; or (3) that the property disposed of came under sec. 7 of the said Act.

Conolly, for the executor, referred to secs. 3, 7, 8 of that Act, and cited *Jarman on Wills*, 5th Edit., 31; *In the Goods of Price*, 12 P. D. 137; *Stanton v. Lambert*, 39 Ch. D. 626; and *Smart v. Tranter*, 40 Ch. D. 165, 43 Ch. D. 587.

REAL, J., made an order for grant of probate in general form, saying that in this case he did not consider evidence of separate estate necessary, as any property which the wife had not power to dispose of would go to the husband, and the will itself mentioned some separate property—namely, the policy of assurance.

Solicitors: *Thynne and Macartney*.

CIVIL COURT.

REAL, J. 27th November, 1893.

In the goods of J. W. FORBES, DECEASED.

Solicitor's lien—Money in court—Next friend of infants—Costs.

The next friend of E. and A. Forbes, infant children of J. W. F., who died intestate, retained H. to take proceedings against the administrator of J. W. F. to compel him to render an account of his administration. The administrator was ordered to pay the money into Court, and the costs of the next friend were allowed out of the estate of J. W. F., the administrator being disallowed his costs. There were no costs available for payment of the next friend's costs, and H. then prayed for a declaration for a charge on the money in Court to the extent of such costs, and that such costs should be paid to the petitioner with the costs of the application.

Held, that the next friend's costs might be paid out of the money in Court, and that the petitioner was entitled to a charge on the fund in Court, but that he should not recover any of the costs of and occasioned by the application, as the petitioner believed the administrator had assets to pay the costs of the next friend.

PETITION by Frederick Gustavus Hamilton, as solicitor for the next friend of infant children, for a charge on money paid into Court on account of costs incurred by the next friend.

J. W. Forbes died on March 5th, 1887, intestate,

and letters of administration in his estate were granted to Arthur Forbes, of Brisbane. In February, 1892, the petitioner was retained by Joseph Murphy, next friend of Eva and Archibald Forbes, the infant children of the deceased, who were entitled, as next of kin, to a share in the distribution of the estate, to take proceedings against the administrator to compel him to exhibit an inventory and render an account of his administration. The necessary proceedings were taken. Application was then made by the administrator for an extension of the time for filing the inventory and the account. The time was extended to the 30th day of June, 1892, conditional on the payment into Court of the sum of £400; in default of payment, the summons to be dismissed with costs against the administrator; and, on payment into Court, the question of costs to be reserved till June 30th. The administrator paid £400 into Court, and, on September 7th, it was ordered by Real, J., that costs of the next friend be paid out of the estate of the said J. W. Forbes, and that the costs be taxed as between solicitor and client, and the administrator was disallowed his costs. The costs allowed to the next friend were taxed and allowed at £44 11s. 8d. The petitioner had made application to the solicitor for the administrator for payment of the costs, and, on August 2nd, 1893, received a letter from him stating that there was no funds available for payment of the costs. A large part of the £400 stood in the Court to the credit of the infants. The petitioner prayed that it might be declared that he, as solicitor employed by the next friend of the infants in the prosecution of this matter, was entitled to a charge upon the money in Court for the amount of his taxed costs, and that out of such money in Court such charge might be paid to the petitioner. He further prayed for costs of this petition.

Groom, for petitioner, in support of the application to enforce the solicitor's lien, cited *Pritchard v. Roberts*, 7 L.R. 17 Equity 222; *Birch v. Oldis*, Ir.R., *Glasscock*, p. 351; *in re Bank of Hindostan, China and Japan*, L.R., 3 Ch., 125.

Joseph Murphy, next friend, appeared in person, and did not oppose payment of the costs of the solicitor; but objected to their being paid out of money in Court. He had not paid the costs.

REAL, J.: I feel disposed to treat the money paid into Court as assets in the estate; but a difficulty arises owing to the applicant not having shown that he was in position to sue the next friend, there being no evidence that the bill of costs was sent to him. If that were proved, I would probably grant the application.

An adjournment was granted.

On the adjourned application, an affidavit of service of the bill of costs and that the money was still unpaid, was read as evidence of the inability of the next friend to pay.

REAL, J.: If I thought that I had the power to do so, I would make Mr. Murphy pay the costs of this application. I cannot understand why he objected to the solicitor being paid his costs out of the estate, seeing, simply, he could not pay them himself. As I have previously intimated, I shall not allow petitioner the costs of and occasioned by the proceedings. Petitioner believed that the administrator had assets enough to pay the costs, as ordered, to the next friend; and I shall not allow the infant's estate to suffer for his confidence. Though his intentions were the best, the petitioner must pay the penalty. I shall, therefore, order that out of the money standing in the name of the infants, being part of the assets of the intestate estate of the late J. W. Forbes, paid into Court under an order made on March 18th, the next friend should be paid his costs, allowed by order of September 17th, 1892, and taxed at £44 11s. 8d. I also direct that the solicitor for the next of kin is entitled to a charge on the said money for the amount of such costs, but that he shall not get any of the costs of and occasioned by these proceedings.

Solicitor: *F. G. Hamilton.*

GRIFFITH, C.J.

8th December, 1893.

Re THE PUNOWNERS' ASSOCIATION, LIMITED.

Company—Costs of Winding Up—Successful Litigant—Insufficient Assets—Priority—Companies Act (27 Vic., No 4), sec. 108.

On an unsuccessful application by the liquidator of a company to settle certain persons on the list of contributories, the costs of all parties were allowed out of the assets. The assets were insufficient, and on an application under sec. 108 of *The Companies Act, 1863*, for directions as to priority, Griffith, C.J., directed the priority to be (1) the liquidator's actual and proper expenses of realization; (2) the costs of the shareholders who were successful on the above said application; (3) the liquidator's costs of the litigation with them, and ordered the costs of the summons for directions to be added to the costs of the parties, and subject to the same order as to priority, the whole order to be without prejudice to the rights of any other persons to whom costs may have been ordered to be paid out of the estate.

Re Dominion of Canada Plumbago Co., 27 Ch., D. 33, followed.

SUMMONS under sec. 108 of *The Companies' Act, 1863*, for directions as to the order in which costs ordered in an application reported in 5 Q.L.J., 56, should be paid, the assets being insufficient to meet the liabilities.

Lilley, for the official liquidator, asked that the liquidator should be declared entitled to be paid ratably with the respondents, and cited *re Marlborough Club Co.*, *ex parte Perceval*, 6 Eq. Ca., 519; *Cape Breton Co. v. Fenn*, 17 Ch.D., 198, 205; *re Home Investment Society*, 15 Ch.D., 167; *re Dronfield Silkstone Co.*, 23 Ch.D., 511; *re Dominion of Canada Plumbago Co.*, 27 Ch.D., 33; *re Staffordshire Gas and Coke Company, Limited*, 9 Times, L.R., 654.

Byrnes, A.G., and *Lukin*, for Barker and others, submitted the costs were ordered out of the assets, and not out of the estate. The respondents' costs should be paid first. *Re Staffordshire Gas and Coke Co.* The official liquidator was an unsuccessful litigant.

C.A.V.

GRIFFITH, C.J.: It is difficult to reconcile the cases. The order in this case was that the costs of the official liquidator and of the Attorney-General's clients should be paid out of the assets

of the company. The costs in question were the costs of an unsuccessful application on the part of the official liquidator to settle Barker and the others on the list of contributories. They were, therefore, successful litigants as compared with the official liquidator, who is an unsuccessful litigant. The assets of the company are said to be insufficient for payment of the costs in full, and the present application is made under sec. 108 of *The Companies Act* for directions as to priority, and it appears that I have power to give such directions (*re Dominion of Canada Plumbago Co.*, 27 Ch. Div., 42). I assume that there are no other parties to whom costs have been ordered to be paid, and whose right is equal to that of the Attorney-General's clients. As between his clients and the official liquidator, I think it is just that they should have priority for their costs of the litigation in which they were successful, but that the official liquidator should be entitled to retain the actual expenses of realization of the assets from which they are to be paid. I, therefore, direct that the order of priority shall be as follows:—

1. The liquidator's actual and proper expenses of realization.
2. The costs of the Attorney-General's clients, and
3. The liquidator's costs of the litigation with them.

The costs of this summons will be added to the costs of the parties, and be subject to the same order of priority. This order is, of course, without prejudice to the rights of any other persons, if there are any, to whom costs have been ordered to be paid out of the assets.

Solicitors for official liquidator: *Lilley and O'Sullivan*.

Solicitor for respondents: *R. J. Leeper*.

DECEMBER SITTINGS OF THE FULL COURT.

VICTORSEN v. ITHACA SHIRE COUNCIL.

Bye-law—Ultra vires—Local Government Act of 1878 (42 Vic., No. 8), ss. 167, 172—Impounding Act of 1863 (27 Vic., No. 22), ss. 17, 38, 40.

A bye-law that the owner of cattle straying on the roads within the boundaries of a Shire Council shall pay a

sum of five shillings to the Council by way of damage to the streets, is *ultra vires*.

SPECIAL case stated by justices for the opinion of the Court as to the validity of a bye-law demanding payment of a sum of five shillings a head from the owner of horses or cattle found straying on any road or thoroughfare within the jurisdiction of the Ithaca Shire Council. Victorson was the owner of a horse which was found straying on one of the roads of the shire. The animal was impounded, and the owner had to pay five shillings, in pursuance of the said bye-law, before the horse was released.

Byrnes, A. G., and *MacDonnell*, for the appellant, submitted the bye-law was *ultra vires*. The Council have power to make bye-laws, but not with regard to impounding. They are, in that respect, in a similar position to private owners. They cannot fix the damages to be paid. Sections 17, 38, and Schedule I of *The Impounding Act of 1863*.

Woolcock, for the respondent, submitted that under sec. 167, subsec. 4, or 28, of *The Local Government Act of 1878*, the Shire Council were empowered to make a bye-law preventing the straying of cattle on the streets of the shire; and that under sec. 172 a penalty might be imposed for breach thereof, and, in addition, that the offender might be compelled to reimburse the Council any expense incurred by reason of the breach of the bye-law. The bye-law in question was, therefore, not contrary to *The Local Government Act*, neither was it contrary to *The Impounding Act*, because that Act only provided for damages done to inclosed lands. Bye-laws should be construed favourably, *Oribb v. Pinnock*, 1 Q.L.J. Suppt., 41. A similar bye-law had been in force for many years in North and South Brisbane, having been approved by the Attorney-General, and, in any event, the respondents should not have to pay costs.

GEIFFITH. C.J.: I do not know of any ground on which this bye-law can be upheld. The Shire Council are in the same position as private owners, in so far as they are entitled to drive

straying horses and cattle to the pound. I do not know of any authority by which they can demand five shillings for themselves for every straying animal in their streets. No serious attempt has been made to support the bye-law upon the point now in question. So far, however, as the bye-law prohibits persons from allowing horses and cattle to stray in the streets under pain of a fine, it was not attacked, and that part of it gives ample protection to the inhabitants. I think that costs should follow the result and be paid by the respondents. The case will be remitted to the justices with the opinion of the Court as expressed.

HARDING and REAL, JJ., concurred.

Solicitor for appellant: *Leeper*.

Solicitors for respondents: *Chambers, Bruce and McNab*.

Re STEPHENSEN.

Insolvency — Certificate of Discharge — Special Resolution — Quorum of Creditors — Insolvency Act of 1874 (38 Vic., No. 5), ss. 5, 93, sub. 7, 167, sub. 2; r. 78 — Notice of Appeal.

S. was adjudicated insolvent. The proofs of debt amounted to upwards of £1,000. There were eighteen creditors in respect of debts over £10. At a meeting of creditors three attended, one being a creditor for £25, another for £10 18s., and another for £3; the two first-mentioned being represented by the insolvent's solicitor as their proxy. The meeting unanimously passed resolutions that the insolvency had arisen from circumstances for which S. could not justly be held responsible, and consented to his applying for his discharge before passing his last examination.

Griffith, C.J., refused the certificate under sec. 167, sub. 2, being of opinion that a special resolution could not be passed at a meeting of creditors at which less than three creditors for £10 and upwards were present, the total number of such creditors being more than three, and that the resolutions were not a *bond fide* declaration of the deliberate opinion of the creditors as to the cause of insolvency, and that he was not bound to act upon them.

Held, on appeal, by Harding, Cooper, and Real, JJ. (reversing Griffith, C.J.), that the meeting was properly constituted; that the resolutions could not be reviewed by the Court; and that the insolvent was entitled to his certificate of discharge.

Re Bennett, 2 Q.L.J., 128; *re Coulson*, 6 Q.L.J., 8, followed.

An appeal from an application refusing a certificate of discharge is not an *ex parte* application within the meaning of sec. 6 of 55 Vic., No. 37, and notice must be given in the ordinary way.

APPLICATION for a certificate of discharge under sec. 167, sub. 2, of *The Insolvency Act of 1874*, to be granted to J. C. J. Stephensen.

The facts of the case appear in the judgment of the Chief Justice, delivered on 29th September.

GRIFFITH, C.J.: This was an application for a certificate of discharge under sec. 167, subsec. 2, of *The Insolvency Act of 1874*, which provides that at any time after the insolvent has passed his last examination, or at any earlier time, with the consent of the creditors testified by a special resolution, the insolvent may apply to the Court for a certificate of discharge, but that such certificate shall not be given unless it is proved to the Court . . . that a special resolution of his creditors has been passed to the effect that his insolvency has arisen from circumstances for which the insolvent cannot justly be held responsible, and that they desire that a certificate of discharge shall be granted to him. The adjudication was made in June, 1888. The resolution of the creditors on which the application was founded was passed at a meeting held on the 18th October, 1892, at which three creditors only attended, one being a creditor for £25, another for £10 18s., and the third for £3; the two first-mentioned being represented by the insolvent's solicitor as their proxy. It appeared on reference to the proceedings that the proofs in the estate amounted to upwards of £1,000, of which proofs for about £300 were in respect of preferent debts which had been paid in full. The creditors in respect of debts exceeding £10 were eighteen in number. The same meeting passed a resolution consenting to the insolvent applying for his certificate before passing his last examination. Both resolutions were agreed to unanimously. When the application came before me I doubted whether a special resolution could be passed at a meeting of creditors at which less than three creditors for £10 and upwards were present, the

total number of such creditors being more than three, and took time to consider the point. The question arises in this way:—A special resolution is defined by sec. 93, subsec. 7, of the Act as a resolution decided by a majority in number and three-fourths in value of the creditors present, personally or by proxy, at the meeting, and voting on the resolution. By sec. 5 it is provided that when it is necessary to compute a majority of creditors no creditor whose debt does not exceed £10 shall be counted in reckoning a majority in number, but the debts due to such creditors shall be taken into account in reckoning a majority in value. Rule 78 provides that a meeting of creditors shall not be competent to act (except for certain formal purposes) unless there are present or represented at it a quorum of at least three, or all the creditors if their number does not exceed three. In this case when the resolutions were proposed and carried there were present only two creditors who could be counted in reckoning a majority in number. Could then the third creditor, who could not be counted for that purpose, be nevertheless counted for the purpose of making up a quorum, and so enabling the votes of the other two to be counted; or does rule 78 mean that to constitute a quorum there must be present or represented at least three creditors whose votes can be counted on the matter in question? If no creditor in respect of a debt exceeding £10 is present at a meeting, it seems clear that a special resolution cannot be passed, there being no one who can be counted in reckoning a majority in number. If one such creditor is present with others whose debts do not exceed £10, can he himself constitute a majority in number? I do not think so. In *Sharp v Daves*, 2 Q.B. D., 26, it was held by the Court of Appeal that one person could not constitute a meeting of shareholders in a company, although no quorum was prescribed by its regulations, the term "meeting" evidently implying the presence of more than one person. For similar reasons I think that one person out of many cannot constitute a majority in number. If this is so, it appears that the mere

presence of other creditors for amounts not exceeding £10 is not sufficient to enable a special resolution to be passed; and the only alternative construction would seem to be that there must be a quorum of creditors whose votes can be counted in reckoning a majority in number. I think that this is the true construction of rule 78; and that for the purpose of passing a special resolution under the Act a meeting of creditors must be considered as two meetings held simultaneously—one of creditors for sums exceeding £10, and one of all the creditors for whatever amount. It is clear that the votes of the two sets of creditors must be reckoned separately, and I think that there must be a quorum of each set of creditors. It follows that the meeting held in the present case was not competent to pass a special resolution, and the Court ought not to act upon the resolution presented to it. Apart from this ground, however, I should feel some difficulty in acting upon a resolution passed under such circumstances as those appearing in this case. The observations of Harding, J., in *re Quinn* (1 Q.L.J., 19), as to the weight to be attached to the absence of opposition on the part of the creditors appear to me to be equally applicable as indicating grounds on which the Court may properly scrutinise the circumstances under which a special resolution is passed, especially when, as in this case, it is passed after so great a lapse of time from the commencement of the insolvency. Judges of this Court are reported to have said that it is not the function of the Judge to agree or disagree with a resolution passed by creditors under section 167, but that the certificate should be granted if the resolution has been duly passed, unless the circumstances specially mentioned at the end of the section are present. (*Re Harrison*, 7th August, 1876; *re Bennett*, 2 Q.L.J., 128.) I have referred to the papers in these cases. In *Harrison's* case the application was made under subsec. 1 of sec. 167, and was supported by a paper signed by all the creditors, expressing a desire that the certificate should be granted. The learned Judge (Lilley, J.) directed the application

to stand over for the purpose of holding a meeting of creditors. The meeting was held, and a special resolution, in terms of subsec. 2, was unanimously passed by the votes of seventeen creditors. The learned Judge is reported to have said that—"Under the circumstances, and the creditors appearing to be unanimous in thinking that the insolvent should have his certificate as evidenced by the resolution, he (his Honour) should not intervene in any way in the exercise of any authority that might be imposed upon him by this section, and he should grant the certificate." I do not find anything in this language to indicate that he considered the Court a mere automaton, bound to register the decree of the meeting. In *Bennett's* case, however, *Harrison's* case was referred to by Mein, J., as deciding that it was not left to the Court to say whether the resolution of the creditors was correct or not. In that case the resolution was passed unanimously at a meeting at which creditors for considerably more than half of the insolvent's debts were present or represented. I do not understand these cases to have decided more than that the Court will not ordinarily review the finding of the creditors on the question of fact whether the insolvency arose from circumstances for which the insolvent cannot justly be held responsible. I entirely agree in that view. I think that the Legislature has made the creditors judges of co-ordinate jurisdiction with the Court itself in determining that question, and they may in many cases have much better means than the Court of forming a correct conclusion on the point. But I think that the finding of the creditors upon which the Court is to act was intended to be a *bona fide* declaration of their deliberate opinion. The words of the 167th section are enabling, and not, like those of sec. 169, imperative; and if there is reason to believe that the resolution does not fulfil this condition I think that the Court is not bound to act upon it. It was evidently contemplated that the special resolution would be passed within a year from the date of adjudication, for by secs. 168 and 169 provision is made for obtaining the opinion of the creditors

after that period by their individual signatures without meeting together; it being no doubt thought that after a year their interest in the matter would be diminished and it would be difficult to assemble a meeting. When, therefore, as in this case, I find that the meeting was held more than four years after the date of adjudication, that the debts of the only two creditors who could be counted in reckoning the majority in number amounted to a small fraction only of the total debts, that these creditors did not personally attend at the meeting but were represented by the insolvent's solicitor, and that the report of the meeting was not filed for more than nine months after the meeting was held, and when all recollection of it would probably have passed from the minds of the creditors, I do not regard the resolutions, even assuming them to have been regularly passed by a duly constituted meeting of creditors, as a *bona fide* declaration of the deliberate opinion of the creditors of the insolvent as to the cause of his insolvency, and I hold that I am not bound to act upon them. On both grounds I think I ought to refuse this application. The refusal will be without prejudice to any fresh application for a certificate that may be made under any other provision of the Act. The materials before me do not enable me to deal with it under any other provision.

From this judgment the insolvent appealed to the October Full Court.

Lilley, for the insolvent, in support of the appeal, claimed to be heard under s. 6 of *The Supreme Court Act of 1892*. The trustee had notice to attend the Court when the application for a certificate was made, and sent in a report favourable to the insolvent. The trustee being absent, the application and proceedings thereupon became *ex parte*, and under *O. LVII., r. 2*, the insolvent has a right of appeal to the Full Court.

GRIFFITH, C.J., said: If this were a substantive motion by way of appeal from me, I could not take part in the decision, and it may be doubtful whether I ought to take any part in a decision even simply on a matter of practice. As a

matter of practice I have no doubt that an application for a certificate of discharge by an insolvent is not an *ex parte* application. I think an *ex parte* application under the Rules means an application of which it is not necessary to give anybody notice. If notice has to be given to another person, then the proceedings are between parties—the person who makes the application and the person to whom notice is given that the application will be made. That seems to me to be the distinction. Notice must be given of an application for a certificate. When an application is made without notice the applicant can appeal without notice. I think this application cannot be heard *ex parte*, but must be heard on notice of appeal in the ordinary way.

HARDING, J., concurred.

REAL, J.: I am of the same opinion. I think that sec. 6 does not apply to an application which can only be made on giving notice to the person who has a right to appear, and be heard against it. The mere fact that such persons do not choose to appear to be heard does not make the application *ex parte* within the meaning of sec. 6.

The application was renewed at the December Full Court, after notice had been given to the trustee.

Lilley referred to *re Bennett*, 2 Q.L.J., 128; *re Coulson*, 6 Q.L.J., 8, and r. 78, and stated that the certificate was refused on two grounds:—(1) that there was not a sufficient quorum of creditors to pass a special resolution; (2) that under the circumstances of the case His Honour differed from the resolution, and refused to give effect to it.

Lilley: The second ground was disposed of in *re Coulson*, where the Full Court decided that the resolution being passed by a competent majority, the Court could not differ. [HARDING, J.: That has always been the law. REAL, J.: The Chief Justice was a party to that decision.] As to the other point, it is submitted that if there were three creditors present at a meeting, they could do anything they liked. The Chief Justice held they had a meeting for some purposes and not for others. [REAL, J.: The

rule does not say so. You have a majority in number and three-fourths in value. You must get a meeting first, and then you must have a majority of that meeting in number and in value.] The meeting was unanimous. Two out of the three creditors present were creditors for more than £10 each, and the third was under £10, so that if they had not been unanimous, there would have been a majority in number and value. This point was decided by Harding, J., in *re Caldicott*, on 4th October last. In that case there were four creditors, all under £10, and the resolution was carried unanimously.

HARDING, J.: Unfortunately I appear to have decided this point while the appeal was pending. Had I known of this judgment, I would have held my hand. I did not see the Chief Justice's judgment. I have no doubt, though I cannot recall the particular case, that I have decided the point before. I have no doubt that I have been acting in the same way, as I am said to have done in *re Caldicott*, during the whole time I have occupied a seat on this bench. Consequently, so far as I am concerned, the matter is *res judicata*, but I do not know that the reasons that I have had presented to me have in any way shaken my previous opinion. I have always been of opinion that having got the meeting constituted, and the meeting being unanimous, it could do anything. As a judge of the Full Court I will decide that, and in my judgment the appeal should be allowed and the certificate of discharge granted.

COOPER, J.: I concur.

REAL, J.: I am of the same opinion. It seems to me that r. 78 is very clear. It defines what a meeting is, and shews that all they have to do is to get three creditors to constitute a meeting. The section shews what must be done when they get a meeting. If it were necessary to count a majority in number, then they could only count those creditors over £10. In the present case there were two creditors over £10, so if it had become necessary to count the majority in value they would have carried the resolution. Looking at the rule and the section, there is no ground for

refusing the certificate. The appeal, therefore, should be allowed, and the certificate granted.

Appeal allowed.

Solicitors: *Lilley and O'Sullivan*.

In the matter of The Crown Lands Act of 1884, and in the matter of AN APPEAL BY F. A. POWELL FROM A DECISION OF THE LAND BOARD.

Crown Lands Act of 1884 (48 Vic., No 28) ss. 17, 18, 21—Land Board—Assessment of Rent—Appeal—Successful Party—Costs against Crown—20 Vic., No. 3, s. 1—Supreme Court Act of 1867 (31 Vic., No. 23) s. 58.

On an inquiry before the Land Board the rent of Galwey Downs was assessed at 22s. per square mile. The lessee appealed to the Supreme Court, contending that rent should be about 12s. 6d. per square mile. Harding, J., fixed the rent at 20s., considered the appellants the successful party, and gave costs against the Crown.

Held on appeal by Griffith, C.J., Cooper and Real, JJ., that there is a clear indication of intention in *The Crown Lands Act of 1884* that the ordinary costs of inquiries before the Board, which are necessary and unavoidable, should be borne by the Crown and the parties respectively, each bearing their own, and that the Board cannot properly grant costs either in favor of or against the Crown unless for "good cause," and that the same rule applies to an appeal to the Supreme Court, which is a continuation of the proceedings before the Board.

Held also that the appellants were no more substantially successful than the Crown; that there were no circumstances to shew that the costs of the appeal were more than ordinary or necessary; and that on that ground the Crown's appeal must be allowed, but without costs.

Per Griffith, C.J.: S. 58 of *The Supreme Court Act of 1867* does not exclude the prerogative rights of the Crown to be exempt from the payment of costs in cases in which that prerogative has not been otherwise excluded.

APPEAL by F. A. Powell and against a decision of the Land Board assessing the rent of the unresumed area of the leased portion of Galwey Downs at 22 shillings per square mile, pronounced on 4th October, 1892. The appellants applied for a rehearing, which was refused. The grounds of the appeal were that the assessment was excessive, inasmuch as portions which were practically useless and unavailable were included in the assessment; that stock had deteriorated in value;

and that the assessment was disproportionate to the value of the property for pastoral purposes. They considered a fair rental would be something between 12s. and 14s. per square mile.

The appeal was heard on 22nd November before Harding, J., and two assessors, the Hon. B. B. Moreton for the Crown, and A. C. Grant, Esquire, for the appellants. Harding, J., decided that the appellants should begin.

Feez and Bannatyne for the appellants. *Byrnes, A.G., Rutledge and Wilson* for the Crown.

HARDING, J., delivered judgment: This is an appeal by Frank Alexander Powell, a person alleging himself to be aggrieved by a decision of the Land Board. The parties have required that the Judges should be aided by assessors, and one assessor has been nominated by each party, and approved by the Judge. The evidence in this case may be taken in the same manner as is prescribed in the case of matters to be heard before the Land Board. In trying the case, it being an appeal against the Land Board's assessment of the rent of Galwey Downs Station, I have followed, as near as possible, the mode of procedure of the Land Board. In the first instance, the question was raised as to who should begin. I have followed the practices of the Supreme Court, that the appellant should commence. But in order that we might have something in nature of issues before us, I followed the course prescribed by the Board, and required the Commissioner to furnish us with his report on the run and improvements in respect whereof the rent shall be paid. That report was put in, Exhibit No 1. Then I required the pastoral tenant to furnish a like report, which we called No. 2. Then the case proceeded as in an ordinary case for trial. The party beginning, the appellants, produced their evidence; then the Crown produced its evidence. The evidence for the appellants went to place before the Court the evidence considered by the appellants necessary to enable the Court to ascertain what should be the rent of this run, in accordance with the 30th section of the Act, sub-section 5. I do not know

if it is necessary, but I think, perhaps, that it is advisable, that the mode of arriving at a conclusion in this judgment upon this evidence should be brought out. I have had the benefit of the assistance of two most able gentlemen as assessors. I made a calculation whilst the case was going on before I put the questions to the assessors. I had that in writing. I find by the answers to the questions which I considered necessary to put to each assessor that to a penny they were exactly the same distance on opposite sides to my result. So, if I had taken their assessments, and divided them by two, after adding them together, I should have saved myself the whole of a good deal of trouble and many hours' anxious calculation, and arrived at the same result. It is a most singular instance, but as it happened, my calculations were in writing before I approached the assessors. It seems to me that a certain amount of improvements can be made on the run at a reasonable expenditure, and that the carrying capacity of the run will then be 8000. That being so, I think the rent should be £400 a year, or £1 a mile for the leased portion.

Feez applied for costs, and cited *re Quinn*, 4 Q.L.J., 4; *re Fairbairn*, *Courier*, 27th March, 1890; *re A.J.S. Bank*, *Courier*, 21st May, 1886; 2 Q.L.J., 145. The appellants were substantially successful.

Byrnes, A.G.: The Crown has succeeded to a greater extent than the appellants. If costs are awarded against the Crown, it should be in proportion to the success achieved by the parties. There is no jurisdiction to give costs against the Crown. *R v. Beadle*, 7 E. & B., 492; *Gough v. Davies*, 4 W.R., 757. The question of costs was not raised in the cases cited for the appellant.

HARDING, J.: It appears that the question has been decided by two judges of co-ordinate jurisdiction. I will follow their decisions, and will order the costs of the appeal to be paid by the Crown. As to the fees of the assessors, I think that is a matter for the taxing officer.

The Crown appealed from so much of this judgment as gave costs against the Crown, on the ground that *Harding, J.*, had no jurisdiction to

award costs against the Crown, and that under the particular circumstances of the case he had no jurisdiction to give costs against the Crown.

Byrnes, A.G.: There was no jurisdiction to award costs against the Crown. If there was the Crown was more successful, and the costs should be apportioned. Costs cannot be awarded against the Crown unless authorised by statute. *Hardcastle on Construction*, 410; *Lord Advocate of Scotland and Dunlop*, 9 Cl. & F., 173; *Young v. Thomas* (1892) 2 Ch. 134; *R. v. Beadle*, 2 E. & B., 492; 18 and 19 Vic., c. 90. If there was jurisdiction to give costs, the Crown was entitled to costs *Robertson v. Robertson*, 6 P.D., 119. In the cases His Honor purported to follow, the question of costs was not raised.

Rutledge: S. 18 of the Act cannot be read in conjunction with s. 17. An appeal from the Land Board to a Judge is the substitution of one original tribunal for another. The proceedings are *de novo*.

Feez: If a successful appellant is not entitled to costs, the right of appeal will be practically abrogated. The artificial rule that the Crown could neither give nor receive costs has been restricted as much as possible. It has been decided in this Court that the Crown should pay costs which did not come under 18 and 19 Vic., c. 90, or under any other Act in which the Crown was specially mentioned. In the *A.J.S. Bank* case, and in *re Fairbairn* no opposition was raised to the allowance of costs. Costs were given in cases against the Stamp Commissioners; *re Smith and Gilchrist's agreement*, 4 Q.L.J., 170; *re Fraser*, 2 Q.L.J., 90; *Britcher v. Williams*, 5 Q.L.J., 39; *Burrey v. Marine Board of Queensland*, 4 Q.L.J., 151; *re Parry*, 8 N.S.W. L.R., 242; *Abnutt v. Queen*, 2 W. & W., 185. SS. 17 and 18 must be read together. As the Board had power to give costs under s. 17, the Supreme Court, which became substituted for the Board, had also the power. *Moore v. Smith*, 5 Jur. (N.S.) 892. The discretion of the learned Judge should not be interfered with.

Bannatyne: The immunity of the Crown from

costs in England and the Colonies had been overridden by statute. The latest case cited by the Attorney General was dated 1857. The course of the Legislature had been to enable the Crown both to ask for costs and in certain cases to enable the subject to obtain costs against the Crown. In cases under the Stamp Act it has been the practice of the Court to award full costs against the Crown when the appeal was successful.

Byrnes, A.G., in reply: The Judge who tried the case came under s. 21. That section gave him no more power than the ordinary law, and the question is whether the Judge would have power to give costs against the Crown under the ordinary statutes. If this was an enquiry in which the Board could give costs, there was no provision for the Court to give them.

C. A. V.

GRIFFITH, C.J.: This is an appeal by the Crown from so much of an order of Mr. Justice Harding, made on an appeal from a decision of the Land Board determining the rent of a run called Galwey Downs, as allowed the appellant costs against the Crown.

It is objected that on such an appeal the Court has no jurisdiction to give costs against the Crown, and that if it has, the learned Judge proceeded on a mistaken principle in allowing them in this case.

In support of the order, reliance was placed on Section 1 of 20 Vic., No. 13, on the provisions of *The Crown Lands Act of 1884* relating to the proceedings before the Land Board, and on section 58 of *The Supreme Court Act of 1867*. There is no doubt that it is at common law a prerogative right of the Crown not to pay costs in any judicial proceeding, and that this prerogative of the Crown will not be held to be taken away by statute except by express words or necessary implication.

It is not, however, necessary that the Crown should be expressly named in the statute if it appears clearly that the law was intended to apply to cases to which the Crown is ordinarily a party. It has accordingly been held that the Crown, or its officers, may be ordered to pay costs in appeals from Justices by special case, the proceedings

from which the appeal is given being proceedings ordinarily taken by the Crown (*Moore v. Smith*, 1 E. & E., 597).

I do not think that the Act 20 Vic., No. 3, has any application in the present case, the proceedings not being proceedings instituted by or on behalf of the Crown or by the Attorney-General (*R. v. Beadle*, 7 E. & B., 492, 26 L.J., M.C. III).

It is necessary therefore to examine the provisions of *The Crown Lands Act of 1884*. That Act established a new tribunal called the Land Board, whose functions are partly judicial and partly advisory. The Board have original jurisdiction in the case of assessment of rents of runs (ss. 30, 31), in the case of disputes as to boundaries of runs (s. 19), in the case of compensation for improvements payable by a selector (s. 18); and any matter connected with the administration of the Act may be referred to them by the Governor in Council.

The Board have also an appellate jurisdiction (s. 27) from decisions of Commissioners granting or refusing applications to select (s. 26), or finding that a lessee has failed in the performance of the conditions of his lease [s. 58 (8)]. Section 17 defines generally the power and duty of the Board with regard to "any enquiry or appeal" held by or made to them. They may summon witnesses; any party to the enquiry or appeal may be represented by counsel, solicitor, or agent; the enquiry or appeal must be heard and determined, and the decision must be pronounced, in open Court; and the Board may make such order as they think fit as to the cost of any "inquiry, appeal, or dispute," heard and determined by them. These provisions appear *prima facie* to be of general application. Section 18 makes special provision as to the mode of procedure when the function of the Board is merely to assess the amount of any rent or compensation payable under the Act. The Commissioner is first to furnish them with a valuation and report on the subject, and the person who will have to pay or receive the amount assessed by the Board is also to furnish them with a similar valuation or claim. The

Board are then on an appointed day to sit in open Court, and after hearing the last mentioned person, if he desires to be heard, to pronounce their decision in open Court. The Board may call such witnesses as they think fit, and may take evidence on oath, affidavit or declaration as they think fit, the procedure in this respect differing from that in other cases, in which apparently the evidence must be taken orally in Court. It appears to have been contemplated that in many cases the parties interested might not attend before the Court, and certainly that the Crown would not ordinarily be represented when the decisions of the Board on questions of assessment are pronounced. The Board can pronounce their decisions although no one appears before them, and although they have no evidence beyond the valuations of the Commissioner and the lessee or claimant. And considering the nature of the questions to be decided, and the number of the cases that would come before the Board, in many of which the parties might not wish to be put to the expense of appearing either personally or by agent, it was natural to make provision enabling the Board to depart in this instance from the regular routine of legal tribunals.

It was urged in argument that this procedure is so different from that prescribed by Section 17 that the provisions of that section should be taken to be excluded. The first part, however, of that section which confers on the Board the power to compel the attendance of witnesses and examine them on oath must, I think, necessarily be held to apply to all judicial proceedings before them, as also must the provision giving the parties the right to be represented. Otherwise the powers of the Board and rights of the parties would be seriously limited in the most numerous class of cases that come before the Board. I think, therefore, that the determination of a question of rental is an "enquiry" within the meaning of this part of section 17. If it is an enquiry for the purpose of this part of the section, I see no sufficient reason for holding that it is not an enquiry for the purpose of the provisions enabling them to award

costs in cases of enquiries held by them. Still, however, it does not follow that they have power to award costs against the Crown. It was contended in the course of argument that it would be absurd if the Land Board could, at a sitting of the Court for pronouncing their decision on a question of rental, award costs against the Crown when the Crown was not represented, and the statute does not contemplate that it need be represented. But I think a sufficient answer to this objection is to be found in requiring the application of the general rule that no one can be condemned unheard. If therefore it were proposed by a Court to make an unusual order against a party actually absent, who is entitled to be present, but whose actual presence is not contemplated by the law, that party should be specially called upon before such an order is made against him. There being then a general power to award costs, does it clearly appear that this power was intended to apply to cases in which the Crown is ordinarily a party, or can full effect be given to the language by holding it to apply only as between subject and subject? Power is expressly given to award costs in cases of appeals to the Board from decisions of Commissioners, and I am not aware of any case of such an appeal in which the Crown, or its representatives would not be a necessary party or parties. The statute, therefore, I think, by necessary implication gives power to award costs against the Crown in such cases. And, as one at least of the classes of enquiries in which the same power is given to the Board in the same words is a class of cases in which the Crown is ordinarily a party interested, I think the same construction must be given to the words as applied to all those enquiries. I am therefore of opinion that the Board has power to give costs against the Crown on the hearing of a question of rental. Still, the question remains whether the Supreme Court has power to give costs on an appeal from the Board.

The right of appeal is given by section 21 which does not mention costs. Section 58 of *The Supreme Court Act of 1867* provides that the Court shall have power to award costs in all cases law-

fully brought before it and not otherwise provided for.

I do not myself think that these words are sufficient to exclude the prerogative right of the Crown to be exempt from the payment of costs in cases in which that prerogative has not been otherwise excluded. But I think that the section applies to proceedings in which the Crown is a party and which are of a class in which that prerogative is excluded. And I think that the exclusion of the prerogative in a Court of first instance must be taken to imply its exclusion in a Court of Appeal, especially when the appeal is, as in this case, to be in the nature of a rehearing. For these reasons, I am of opinion that the learned Judge had power to award costs against the Crown.

I pass to the other objection that the learned Judge proceeded on an erroneous principle in awarding them. The Commissioner's valuation furnished to the Land Board was 24s. 4½d. per square mile. The pastoral tenant's valuation was 12s. 6d. per mile. The result of the appeal was that the rent was fixed at 20s. a mile, being 2s. less than that fixed by the Board, and 7s. 6d. more than the tenant's valuation. We have communicated with the learned Judge, who informs us that he was of opinion that the appellants were the successful parties, and saw no reason why the costs should not follow the event. It is to be noted that the mode of assessment prescribed by the Act is compulsory both on the Crown and on the tenant, and that the Crown can neither abate or increase the rent when it has been fixed by the Board. It is not necessary to decide whether the Crown can appeal from the Board's decision, but the tenant may appeal to this Court, and it is, I think, contemplated that the Crown should be represented on the hearing of the appeal, which is to be in the nature of a rehearing. Bearing in mind that this was the character of the appeal, I do not myself think that in this case the appellants were substantially successful any more than, if as much as, the Crown. Still, if the costs were in the discretion of the learned Judge, we cannot

interfere. If, however, the Act indicates a clear rule to be applied in awarding costs, we can enquire whether that rule has been observed.

I think that the Act indicates a clear intention that the ordinary costs of inquiries before the Board as to rental, inquiries which are necessary and unavoidable, shall be borne by the Crown and the parties respectively, each bearing their own, and that the Board cannot properly grant costs either in favour of or against the Crown unless for good cause, as for instance if such costs were occasioned by unreasonable or improper or oppressive conduct on the part of the Crown or the other parties. I use the term "good cause" as it is one of recognised and settled meaning. I think that the same rule should be applied in the case of an appeal from the Land Board to this Court, which is merely a continuation of the proceedings before the Board, and to which the Crown is equally a party without any option on its part, or any means of avoiding the further litigation.

If this is the true rule, and I think it is, this Court can enquire as to the existence of any facts which would amount to good cause for awarding costs, just as it may as to the existence of good cause for depriving a successful party of his costs after a trial by jury.

There are no circumstances in the present case to show that the costs of the appeal were more than the ordinary and necessary costs of an enquiry carried to the Supreme Court. The fact that the Governor in Council refused to remit the matter to the Board is not, I think, of itself a sufficient reason.

I think, therefore, that in the present case the Crown could not properly be ordered to pay the costs of the appeal to the Supreme Court, and that the appeal must be allowed on this ground. I think that there should be no costs of this appeal, the Crown not having succeeded on the main point argued before Harding, J., and this Court.

COOPER and REAL, JJ., concurred generally in this judgment, but expressed no opinion on the subject of the Crown's immunity from costs.

Solicitors for appellants: *Hart, Flower and Drury*.

Solicitor for Crown: *J. Howard Gill, Crown Solicitor*.

O'BRIEN v. O'BRIEN AND ANOTHER.

Divorce—Countercharges—Costs—Apportionment.

In an action for divorce the petitioner made certain charges of misconduct against the co-respondent, and the co-respondent, besides denying these charges, made countercharges of misconduct against the petitioner. The petitioner failed in his case, and the co-respondent was unable to prove his charges. Harding, J., ordered the petitioner's costs of and occasioned by the countercharges raised by the co-respondent to be taxed and paid by the co-respondent; the co-respondent's costs of his defence, except such costs as aforesaid, to be paid by the petitioner.

Held by Griffith, C.J., Cooper and Real, JJ., that on that order the petitioner was entitled to a complete indemnity for the expenses to which he had been put by the countercharges, and the co-respondent complete indemnity for his expense in defending the suit, except so far as he had increased them by the countercharges; and that it did not mean that there should be a general apportionment of the costs of the suit.

APPEAL from an order made by Harding, J., in the action *O'Brien v. O'Brien* on 14th June, 1893. In that action, charges of misconduct were made against the co-respondent by the petitioner, and countercharges by the co-respondent against petitioner. Both failed in their proof, and Harding, J., ordered the petitioner's costs of and occasioned by the countercharges to be taxed and paid by the co-respondent, the co-respondent's costs of his defence, except such costs as aforesaid, to be paid by the petitioner.

The taxing officer gave the co-respondent the general costs of the action, and allowed the petitioner one day's costs of the hearing on the countercharges. Costs were also allowed for a commission for the examination of witnesses in Sydney.

An appeal was made to Harding, J., on 30th November, when the taxing officer's taxation was varied, and from this order the petitioner appealed.

Lilley, for petitioner, submitted that under the order the petitioner was entitled to the costs of

all the items which related exclusively to the countercharges, and the co-respondent all the items relating to the petition, and the general costs of the action should have been apportioned. The Commission to Sydney was unnecessary, as the only witness examined could have been examined in Brisbane. *Hardy v. Hull*, 17 Beav 355; *Heighington v. Grant*, 1 Beav 228; *Farrow v. Rees*, 4 Beav 18; *Real and Personal Advance Co. v. McCarthy*, 18 Ch.D., 362; *Jenkins v Jackson*, 60 L.J. (Ch.), 206.

Feez, for co-respondent, submitted the Judge had exercised his discretion as to the costs of the commission. In interpreting the order the taxing officer followed the ordinary rules and gave the petitioner the costs of the countercharges, and the co-respondent the costs of the defence, the general costs being the defendant's costs. The order meant that the co-respondent was to have the general costs of the cause, *minus* the costs occasioned by the countercharges. An express order was necessary to deprive him of the general costs. *Mason v. Brentini*, 15 Ch.D., 289; *Clark v. Clark*, 34 L.J., 71.

Lilley, in reply, cited *Hartley v. Hunt*, W.N. (1887) 184.

GRIFFITH, C.J.: This is a divorce suit in which the petitioner charged misconduct on the part of the respondent and the co-respondent, and the co-respondent, besides denying these charges of misconduct, set up other charges of misconduct—countercharges as they are called—against the petitioner. The petitioner failed in his case, and the co-respondent's countercharges also failed in proof. On that His Honor, Mr. Justice Harding, made an order which, as far as it is material for consideration now, was in these words—"The petitioner's costs of and occasioned by the countercharges raised by the co-respondent are to be taxed and paid by the co-respondent, co-respondent's costs of his defence, except such costs as aforesaid, to be paid by the petitioner," and the question has arisen whether under that order the petitioner is entitled as against the co-respondent to recover part of the general costs of the suit,

and a similar question is whether the co-respondent in his costs is entitled to the whole of the general costs of the defence, or only in a proportionate part of them. The cases relied upon by Mr. Lilley were in all cases in which the plaintiff had succeeded in part of his claim, and in which he had been allowed costs of the suit, except in so far as they related to the part in which he was unsuccessful. They were all cases on the Chancery side of the Court. If even this had been a case of a plaintiff recovering the costs of an action, except so far as they were occasioned in the part in which he was unsuccessful, the costs would have to be apportioned—that is to say, they would be apportioned for the purpose of depriving him of some of the costs which he would otherwise get. No instance has been brought before us in which this rule has been applied to the defence, and I think the reason is quite plain. The reason given by Sir George Jessel in the case of *The Real and Personal Advance Company v. McCarthy*, in which he says the rule does not apply to costs occasioned by defence, is this—"There is an apportionment of costs in equity, that is an apportioning of costs between the different claims. If the plaintiff get his costs, except so far as they were occasioned by a particular claim, there would be an apportionment of the general costs, which are the costs occasioned by all the claims." Considering this as an indemnity, it will be seen that the rule, instead of being an artificial one, is a rule of common sense. If a man brings several claims, and only succeeds in one, and fails in all the others, is entitled to get the whole of the general costs against the defendant, he would be getting something more than indemnity. He would be getting part of the costs in the matters in respect of which he would fail, so that the apportioning of the costs is the only way of doing justice between the parties. Applying the same rule of indemnity to the case of a defendant who has succeeded in one defence and failed on others, if the plaintiff were entitled to recover part of the costs against him he would be in a better position than if the defence had not been set up.

The defendant does not require the apportionment. If you gave him more costs than he would have if that defence had not been set up, he is actually profiting at the expense of the co-respondent. He is profiting out of another man's fault. The principle of indemnity is that a man shall be put in the same position as if that which ought not to be done had not been done. In the case of an improper defence being set up, he is to be put in the same position as if that defence had not been set up—no better and no worse. The case of *The Real and Personal Advance Co.*, dealt with by Sir George Jessel is the only case exactly in point with the present case, with this distinction in this case there were two defendants, and they set up two defences, and in the other there was one defendant who set up two defences. In this case where one defendant was ordered to pay the plaintiff his costs, except so far as they were occasioned by one of the defendant's defence, the plaintiff was not entitled to include any of the general costs of the action. Now, if in this case the plaintiff gets all the expenses to which he had been put by the unnecessary defence of the countercharge, he is indemnified against the consequences of them, and the defendant is equally entitled to be indemnified against all expenses that he has been put to in the suit, except so far as he has increased them himself. That appears to be a common-sense principle. There has been no authority cited to show that the words used by Mr. Justice Harding mean anything else. The only authority cited shows that the words mean that. It appears to me that this is the order that His Honor did make. [A verbatim copy of His Honor's note of the order was put in.] That is exactly what I have endeavoured to express. It gives the petitioner complete indemnity for the expenses to which he was put by the countercharges, and the co-respondent complete indemnity for his expense in defending the suit, except so far as he has increased them by the countercharges. I think, therefore, that the appeal fails, and it must be dismissed with costs.

COOPER, J.: I concur.

REAL, J.: I think also that the appeal should be dismissed with costs. I do not quite base my decision on precisely the same form of grounds. We have to interpret the modern meaning of the words. The words, I have no doubt, acquired a particular meaning in consequence of the place where they were used, where, so to speak, they met the justice of the case. I think that in the ordinary and natural sense of the words they would not in any case mean, if it was a matter *de novo*, that a party who was to get costs of and occasioned by a particular matter would also get what are called the general costs. I think that the principle of interpretation is properly and strictly stated in *Smith on Practice*, who says that the words would mean in the ordinary sense, "taking from the whole of the costs the increase that was made in consequence of the unfounded claim; the balance would be the costs not occasioned by that claim." If, therefore, this were a matter coming before us in the first instance, to my mind there would be no difficulty in dealing with it. The words would mean what they say—the costs of and occasioned by the claim on which you succeed, which I would take to be as laid down in *Smith on Practice*, as much of the whole of the costs as would not have been incurred had you made no unfounded claim. That is exactly and precisely how I would have interpreted it if it were a matter dependent on the common use of the word only. That would meet what I may call the natural justice of the case. The plaintiff would only get from the defendants those costs which he would have got if he had never made a claim upon which he had failed, and the defendant would be paid those costs which he had incurred in consequence of that claim being made, and would suffer no more costs than he would have suffered if the claim had never been made. But the Court of Equity considered, rightly or wrongly—rightly, I think—that a person should not take advantage of a genuine claim which he has, to try a right on a matter which was doubtful. At all events, if he did so, that Court decided that he should do it upon the terms, that if he failed, he

would lose part of the general costs of the action. That, however, until comparatively recently, did not apply in the common law side. In Equity the costs were always in the discretion of the Judge, but in the common law side there was no discretion as to costs. In Equity two forms of order were used. When it was intended that a person should get the costs, merely so far as they were increased by the unfounded claim, one form was used; and when it was intended that the plaintiff or claimant was, so to speak, to be punished for uniting unfounded claims with well-founded claims, another form of order was used; and, although that second form of order was couched in language which in the ordinary sense would mean no more than the first form of order, by long usage by the Masters in Chancery, who had the taxation of costs supported by the Judges, it had acquired a special meaning. It was understood by their officers to mean that the costs should be apportioned. The effect of that has been that wherever the costs of a claim are given, and such costs as related to or were occasioned by the claim, the language is interpreted to mean precisely the same as if the Judge said—"You will have the costs occasioned by the claim on which the plaintiff has not succeeded, and you will also have a proportionate part of the general costs." It seems, then, that when a Judge intends that a person shall only have the costs so far as they were increased by the unfounded claim and part of the general costs, that he uses the words "relates to or occasioned by." That specific interpretation of the words arose in consequence of the nature of the cases to which the order was applied. They were always applied to cases of claim. The rule was laid down in the case of *Begbie v. Fenwick*, reported in L.R. 6 Chancery, 869. In that case you find the two forms of order, the one granting what in a natural sense the order would mean, and the other relating to the increase in the costs, meaning that the Court intends to inflict, so to speak, punishment—that is, giving the defendant a portion of the costs. That was the state of affairs when the Act was passed enabling the Courts of

Common Law to also give costs in their discretion. When the Courts of Equity and Common Law became, as it were, one, and the powers that Courts of Equity had formerly used and always exercised were given to Judges of Common Law, it was held, as pointed out by Jessel, L.J., that the particular order in question does not apply to a mere matter of defence. The rule is not applicable to costs occasioned by defence. The reason which gave rise to the application of the words in the particular sense could never be applied to a matter which was a matter of defence, because it would be absurd to say that a man would be wrong in setting up fifty matters if he had them as grounds of defence. There may be something wrong in a man having a well-founded claim uniting with it unfounded claims for the purpose of saving expense, but there can be nothing wrong in a man who has fifty matters to raise against a claim set up against him setting up each and every one of them. It would certainly be contrary to natural justice to hold that a person who had no right to succeed against another because the latter failed in some part of his defence, should be entitled to more costs than the costs occasioned by the defence on which he was successful. I have come to the conclusion that this form of order, although applicable to a case where a matter is set up in the nature of a claim by a person called a plaintiff who seeks to recover something from another, is not applicable to a case where that is not what he does—where he simply uses his claim as a weapon of defence to prevent the other recovering against him. Consequently, although the words to my mind are to be interpreted without reference, so to speak, to what may have originally given rise to that specific form of interpretation, still they are not to be extended to matters to which they have never been extended by the Courts in which they were used. For these reasons, I think, the appeal should be dismissed with costs. With regard to the smaller matter of the costs of the commission, even on the appellant's own statement of the case, it appears to me that the taxing master was right.

Judgment accordingly.

Solicitors for petitioner: *Lilley and O'Sullivan*.

Solicitor for co-respondent: *Cohen*.

LASCELLES v. M'SWAIN AND OTHERS.

Will—Charitable Bequest—The Religious, Educational, and Charitable Institutions Act of 1861 (25 Vic., No. 19) ss 1, 3.

A., by his will, after certain bequests had been satisfied, devised the residue of his estate "to the Presbyterian Church, at Spring Hill, Brisbane, called St. Paul's, under the pastorate of the Reverend J. F. M'Swaine," and directed L., his executor and trustee, to pay and apply the same to, and for the use and benefit of the said Church as in his sole discretion should seem fit, or to pay the same to the Churchwardens for the time being of such Church, whose receipt should be a sufficient discharge. The will was not attested by three persons, nor registered under the provisions of *The Religious, Educational, and Charitable Institutions Act of 1861*, but was attested by two witnesses, and executed as required by *The Succession Act of 1867*.

In 1863 several Presbyterian Congregations in Queensland joined themselves into an Ecclesiastical body called the Presbyterian Church of Queensland. At a later period St. Paul's Church voluntarily joined with the other congregations. The moderator, clerk, and treasurer of the General Assembly of the Ecclesiastical body were duly incorporated under the name of "The Presbyterian Church of Queensland." St. Paul's congregation, except in so far as it was a part of that body, never became incorporated. No money or property of the congregation was ever vested in the body known as the Presbyterian Church of Queensland, or in the body corporate.

Held by Harding, Cooper and Rea, J.J., that St. Paul's Church was an integral part of the Presbyterian Church of Queensland, that the bequest was invalid.

Held also, that where a devise or bequest is made to any integral part of a corporation, registered under *The Religious, Educational, and Charitable Institutions Act*, it is a bequest or devise to the corporation, and the corporation in the administration of their trusts applies the devise or bequest for the purposes of the particular part of the corporation to which the donor desired that it should be applied.

Per Harding, J., that where the whole of a religious body has once been incorporated by letters patent issued to it, the whole of the body with all its integral parts becomes a corporation for the purposes mentioned in the said Act, and that no integral part of that body is entitled to have issued to it letters patent for a corporation. *Re Swan's Will*, 4 Q.L.J., 171, discussed and followed.

SPECIAL case stated by consent of all the parties for the opinion of the Court.

This action was commenced on the thirtieth day of May 1893 by a writ of summons whereby the plaintiff claimed as executor and trustee of the will dated the fifteenth day of May 1890 of Robert Adair deceased to have the real and personal estate of the said Robert Adair administered the defendants John Fleming M'Swaine Thomas Bruce and James Crombie being sued as members of Saint Paul's Presbyterian Church Session and the defendant Thompson Adair as one of the next of kin of the testator.

1. Robert Adair late of Roma in the colony of Queensland Gentleman deceased by his last will and testament dated the fifteenth day of May 1890 appointed the Plaintiff Francis Molesworth Lascelles of Sandgate in the said Colony of Queensland Town Clerk of Sandgate aforesaid to be sole executor and trustee of his said will and thereby gave devised and bequeathed the whole of his estate both real and personal and of whatsoever nature kind and quality and wheresoever situate unto his said executor and trustee to sell and convert the same or any part thereof into money as he in his sole discretion should think fit and to invest the proceeds of such sale or conversion thereof as therein mentioned and to stand possessed of the principal moneys and the annual income arising therefrom (after payment of all his just debts and funeral and testamentary expenses as therein directed) Upon trust to pay certain pecuniary bequests therein mentioned but not necessary to be herein set forth And as to the rest residue and remainder of his said real and personal estate and effects the testator charged and made the same liable to the payment of £1 per week to his wife Johanna Adair (who predeceased him) during her life as therein mentioned and after making such provision for his said wife gave devised and bequeathed the said rest and residue of his said real and personal estate or the investments representing the same in the following terms namely "To the Presbyterian Church at Spring Hill "Brisbane aforesaid called Saint Paul's now under the "pastorate of the Reverend J. F. M'Swaine and I direct "my said executor and trustee to pay and apply the "same to and for the use and benefit of the said Church "as in his sole discretion shall seem fit or to pay the same "to the Churchwardens or the time being of such Church "and whose receipts shall be good and sufficient "discharges to my said executor and trustee for any "moneys he may pay them to be applied for the use and "benefit of the said Church as aforesaid."

2. The said testator died on or about the twenty fourth day of August 1892 without having revoked or altered the said will.

3. Probate of the said will was duly granted to the plaintiff the executor appointed by the said will on or about the thirtieth day of September 1892.

4. The said will of the said testator was not attested by three witnesses nor registered under the provisions of *The Religious Educational and Charitable Institutions Act of 1861* (hereinafter called "the said Act") but was attested by two witnesses only and executed in the manner required by *The Succession Act of 1867*.

5. Prior to the date of the events hereinafter mentioned a certain congregation of Presbyterians calling themselves

the congregation of the United Presbyterian Church at Brisbane aforesaid were entitled to certain lands situate in Creek Street Brisbane aforesaid which lands were vested in John Petrie Andrew Fenwick James Johnson and Richard Cannan as trustees for the said congregation.

6. At an assembly or conference of delegates from Presbyterian congregations other than the said congregation held at Brisbane aforesaid on or about the twenty-fifth day of November 1863 certain Articles of Union were adopted for the purpose of associating the Presbyterian Congregation of Queensland together by voluntary compact as an ecclesiastical body under the name of the Presbyterian Church of Queensland (hereinafter called "the said ecclesiastical body").

7. By Deed Poll dated the seventh day of September 1864 the said John Petrie Andrew Fenwick James Johnston and Richard Cannan executed a declaration of trust concerning the said lands so vested in them as aforesaid.

A copy of the said Deed Poll is annexed hereto marked with the letter "A" and is to be taken as forming part of this Case.

8. Shortly after the date of the said Deed Poll and prior to the month of May 1874 the said congregation (then known as the Creek Street Presbyterian Church) voluntarily joined the said ecclesiastical body and the members for the time being of such congregation (hereinafter called "the said congregation") thereupon became and have since continued to be a congregation of the said ecclesiastical body.

9. In or about the month of May 1874 the General Assembly of the said ecclesiastical body adopted certain Rules and Forms of Procedure.

A copy of the said Articles of Union hereinbefore mentioned and of the said Rules and Forms of Procedure are annexed hereto marked "B" and are to be taken as forming part of this Case.

10. By Letters Patent dated the thirteenth day of June 1876 and issued under the seal of the Colony in pursuance of the authority in the said Act in that behalf contained the Reverend William Lambie Nelson the Reverend Charles Ogg and James Bryden respectively holding and exercising the office of Moderator Clerk and Treasurer of the General Assembly of the said ecclesiastical body and their successors for ever (hereinafter called "the said body corporate") were duly incorporated by the name and style of the Presbyterian Church of Queensland. The present Moderator Clerk and Treasurer of the said General Assembly are respectively the Reverend C. J. Legate the Reverend Richard Kerr and Gilbert Lang.

11. Save as hereinbefore appearing the said congregation and the said ecclesiastical body have not either of them ever been incorporated under the said Act.

12. From and after the time when the said congregation joined the said ecclesiastical body as aforesaid the said lands in Creek Street aforesaid until the sale thereof hereinafter mentioned were always vested in trustees elected solely by the said congregation and were always held by them upon the trusts and subject to the powers and provisions in and by the said Deed Poll contained

and declared concerning the same and upon and subject to no other trusts powers or provisions whatsoever.

13. In or about the year 1885 the said lands in Creek Street aforesaid were sold with the sole consent of the said congregation and prior to the month of February 1887 the said congregation partly out of the proceeds of such sale as aforesaid and partly out of other funds belonging to the said congregation purchased other lands in Leichhardt Street Spring Hill Brisbane aforesaid and erected and prior to the fifth day of May 1889 completed thereon a Presbyterian Church called St. Paul's.

14. The said congregation has since the year 1876 and the said church called Saint Paul's has since the date of its completion and the same respectively still are under the pastorate of the defendant John Fleming M'Swaine the Presbyterian Minister thereof And save as aforesaid there is not and never has been any other Presbyterian Church at Spring Hill Brisbane aforesaid or under the pastorate of the said defendant John Fleming M'Swaine.

15. The said lands at Spring Hill Brisbane aforesaid have since the purchase thereof by the said congregation always been and still are vested in trustees elected solely by the said congregation and have always been and still are held by such trustees upon the trusts and subject to the powers and provisions in and by the Schedule of Trusts to a certain Nomination of Trustees registered under the provisions of *The Real Property Acts of 1861 and 1877* and dated the thirty-first day of January 1887 contained and declared concerning the same and upon and subject to no other trusts powers or provisions whatsoever.

A copy of the said Nomination of Trustees together with the said Schedule of Trusts is annexed hereto marked with the letter "C" and is to be taken as forming part of this Case.

The present registered proprietors of the said lands at Spring Hill Brisbane aforesaid as such trustees as aforesaid are Robert Langlands Armour and David Laughlan Brown.

16. No lands moneys or other property of the said congregation have ever been or are now vested in the said ecclesiastical body or the said body corporate or either of them.

17. There are no Churchwardens under the Presbyterian Polity nor of the said congregation but the temporal affairs of the said congregation are managed by a Committee of Management elected by the said congregation according to the directions of the said rules and forms of procedure.

18. The Defendants other than the Defendant Thompson Adair contend that the abovementioned testamentary disposition in favor of the Presbyterian Church at Spring Hill Brisbane aforesaid is effectual. The defendant Thompson Adair contends that under the circumstances hereinbefore appearing the said testamentary disposition is void by virtue of the provisions of the said Act.

The questions for the opinion of this Honorable Court are—

1. Does the said testamentary disposition take effect or does the same fail?

2. If the Court shall be of opinion that the said testamentary disposition takes effect from whom can the plaintiff obtain good and sufficient discharges in respect of the property therein comprised or by whom shall such property be applied upon the trusts of the said Will?

3. By whom and out of what funds ought the costs of this case to be paid?

Dated the 30th day of August 1893.

The case was called on at the September Full Court when Griffith, C.J., stated that as he had advised on the case while at the bar, he was unwilling to take part in deciding the case, and expressed an opinion that two judges could hear the case under s. 6 of *The Supreme Court Act of 1892*, but Harding and Real, JJ., held that three judges must hear the case, unless the conditions mentioned in that Act existed, and the matter was adjourned till the December Full Court, when the case was argued before Harding, Cooper and Real, JJ.

Feez and Leeper for the executor to submit to the order of the Court.

MacDonnell for the defendant Thompson Adair, one of the next of kin of the testator, submitted that St. Paul's Church was a unit of a corporation and could not obtain property which under the circumstances could not go to the corporation. The bequest was void. The relations between the body corporate and the Church as set out in rules of the former were of so intimate a nature that the Church could not be considered a separate entity. *Re Swan's Will*, 4 Q.L.J., 171; *The Wickham Terrace Presbyterian Church Act of 1884*; *The Ann Street Presbyterian Church Act of 1889*; *The St. Andrew's Presbyterian Church of Rockhampton Act of 1891*; and *Presbytery of Edinburgh v. Robert de la Condamine*, 41 Scottish Jurist, 188.

Shand and Scott for the other defendants. We submit that the object of the testator's bounty was clear. An attempt has been made by the plaintiff to confuse that object with persons of whom there is no reason to believe the testator had any knowledge. There has never been more than one Presbyterian Church at Spring Hill under the pastorate of the Rev. J. F. M'Swaine.

No other body answers the description in the will. Although a part of a corporate body, it exists, is governed, and holds property apart from that body. If St. Paul's Church was swallowed up by an earthquake, the corporate body would continue to exist. The corporate body could not sue for the bequest. There is no reason why St. Paul's Church should not itself become incorporated apart from the corporate body of the Presbyterian Church of Queensland. A parallel case may be instanced in the cases of the Universities of Oxford and Cambridge, which are corporations, and have separately incorporated colleges. A similar grant under similar circumstances to St. Ann's Presbyterian Church was allowed by Lilley, C.J., in *Mortimer's Will*, 22nd June, 1892. [REAL, J.: In that case it was stated in the affidavits that the Church was not incorporated and registered under the Act. The question arose on an application to pass executors' accounts, but was not argued.] It was in exactly the same position as St. Paul's Church. *Re Swan's Will* is clearly distinguishable, as in that case both the beneficiaries were registered under the Act. The statutes cited by the plaintiff's counsel were private Acts passed for a particular object. *Lang v. Purves*, 15 Moo P.C., 389; *Forbes v. Eden*, L.R. 1 H.L.R. (Sc), 568; *Bruce v. Presbytery of Deer*, *ib.* 96, were cited.

C. A. V.

HARDING, J.: This is a special case stated for the opinion of this Court by Francis Molesworth Lascelles, as plaintiff executor and trustee of Robert Adair, deceased, and John Fleming M'Swaine, Thomas Bruce, and James Crombie, at present being sued as members of the St. Paul's Presbyterian Church Session, and against Thompson Adair, one of the next of kin of the testator already mentioned; the question for the decision of the Court being whether the testamentary disposition contained in the will of Robert Adair takes effect or fails. And then certain other questions have been stated, which at the present moment it is not necessary to refer to. Robert Adair, by his will dated 15th May,

1890, devised and bequeathed certain properties for holding and conversion to Francis Molesworth Lascelles, which were ultimately to be given in these words—"to the Presbyterian Church, at Spring Hill, Brisbane, called St Paul's, now under the pastorate of the Reverend J. F. M'Swaine, and I direct my executor and trustee to pay and apply the same to and for the use and benefit of the said church as in his sole discretion shall seem fit, or to pay the same to the churchwardens for the time being of such church for the use and benefit of the church aforesaid." Then the case states the probate of the will, the fact that the will was not attested by three witnesses, and was not registered under *The Religious, Educational, and Charitable Institutions Act of 1861*, but was executed in accordance with *The Succession Act of 1867*. Then the case goes on to state the status of the beneficiary, the St. Paul's Presbyterian Church, Spring Hill, Brisbane. It narrates its origin and history, which is shortly as follows:—That a certain congregation of the Presbyterians, calling themselves the congregation of the United Presbyterian Church of Brisbane aforesaid, were entitled to lands in Creek Street, of which Petrie, Fenwick, Johnston and Cannan were the trustees for that congregation; that at an assembly of the delegates from the Presbyterian congregations, other than this congregation, articles of union were adopted for the purpose of associating the Presbyterians of Queensland together under the name of the Presbyterian Church of Queensland. By a Deed Poll on the 7th September, 1864, Petrie, Fenwick, Johnston and Cannan executed a declaration of trust of the lands in Creek Street, in trust only for the use of "the said congregation of the United Presbyterian Church of Brisbane, at present under the pastoral charge of the Reverend Mathew McGavin." After the date of the execution of that Deed Poll, and before May, 1874, the congregation joined the ecclesiastical body, which had been previously constituted under the name of the Presbyterian Church of Queensland, and has since continued to be a

congregation of the said ecclesiastical body. In May, 1874, a general assembly of that ecclesiastical body adopted forms and rules of procedure, and by letters patent dated 18th June, 1876, under the seal of the Colony, and in pursuance of the authority of *The Religious, Educational and Charitable Institutions Act*, certain persons were incorporated under the name and style of the Presbyterian Church of Queensland; and except in that way these congregations have not been incorporated under the Act. From the time of the congregation joining the ecclesiastical body, the lands in Creek Street, until their sale, continued vested in the trustees elected by the congregation, and were held by them upon trusts, which I have already referred to. But in the year 1885 the lands in Creek Street were sold, and from the proceeds other lands in Leichhardt Street, Spring Hill, were purchased, and there was erected and completed thereon before May 5th, 1889, for that congregation of Presbyterians, that Church called St. Paul's. That Church was since the year 1876, and since the date of its completion, under the pastorate of the Reverend John Fleming McSwaine, one of the defendants, as the Presbyterian Minister thereof, and with the exception of that Church there has never been any Presbyterian Church at Spring Hill under the pastorate of that gentleman. But the lands at Spring Hill were and are now vested in trustees elected solely by the congregation, and are held by them upon trusts mentioned in the schedule of the nomination of trustees, to which I will not refer. The present registered proprietors are Messieurs Armour and Brown. No money, no property whatever of this congregation has been, or is now vested in the ecclesiastical body. There are no Churchwardens; the temporal affairs of the Church are managed by a Committee of Management. The contention of the three defendants other than Thompson Adair is that the testamentary disposition in favour of the Presbyterian Church at Spring Hill is effectual, whereas the defendant Adair contends that it is void by virtue of the provisions of *The Religious,*

Educational and Charitable Institutions Act. Those are the facts as stated by the parties, and that the question which they desire to have answered by this Court. The determination of that question depends upon the construction of *The Religious Institutions Act*—an Act which has already been construed by this Court in the case of *Swan's Will*. It may be well before dealing with that case to consider the terms of the Act itself. The objects of *The Religious, Educational and Charitable Institutions Act* are to provide facilities for the transmission and management of properties and effects granted to or dedicated to religious or charitable uses. The means by which these objects are to be carried out is by granting letters patent under the great seal of the Colony, declaring any persons and their successors for ever to be a body corporate by such name as the letters patent give. There is a declaration that these persons shall have a perpetual succession and a common seal for themselves and their successors, and a provision made for them to purchase, acquire and possess goods, chattels, gifts or benefactions whatsoever. Then there is a provision in the third section of the Act setting forth the mode in which gifts to such a corporation are to be effected. From time to time as a Judge administering the Act, so far as it is necessary for this Court to administer it in Chambers, when I have been applied to, I have construed that part of the Act, which I have referred to, to mean that any church or ecclesiastical body, notwithstanding that it may consist of any number of integral parts, will not have issued to it as a whole more than one letters patent forming one corporation. That in other words the whole of the church or religious body having once become incorporated by letters patent issued to it, thereby the whole body with all its integral parts became a corporation for the purposes mentioned in the Act, and that no integral part of that body was entitled to have issued to it letters patent for a corporation. I have always maintained that opinion, and I still maintain it, so far as I have construed it as a

Judge of first instance. The Act then came before me in Full Court, and was construed by this Court. I concurred in the observations which were made in the judgment delivered by the then Chief Justice (Sir Charles Lilley), which, although more elaborate than I had given, were to the same effect. Now the decision in that case was, that where a bequest or devise is made to any integral part—that is to say any congregation, as it would be in this case—of the whole corporation, that is a bequest or devise to the corporation, and that the corporation in the administration of their trusts applied the devise or bequest for the purposes of the particular integral part of the corporation to which the donor desires that it should be applied. If that is the correct result of that decision and a correct interpretation of this Act, and if this was a bequest in the will of Adair to the Presbyterian Church at Spring Hill, Brisbane, aforesaid, it is to the corporation and only to the corporation, and when it gets to the corporation, then the corporation can apply it to the purposes of that church. That is to say, they hold the legal estate or the property in trusts for the purposes pointed out by the testator for the benefit of the church. That being so, it now becomes necessary to consider the effect of the 3rd section of the Act in regard to a bequest to a corporation, which says—"Every deed of grant, gift, benefaction or testamentary disposition to or in favour of any such corporation, shall be made in the presence of and attested by three credible witnesses, and shall be executed and registered one month previous to the decease of the person making such deed of grant, gift, benefaction or testamentary disposition." The policy which prompted the passing of that section was pointed out, I think correctly, in the judgment in *Swan's Case*. It is unnecessary to repeat it, but in this case we find that this will was not registered one month previous to the testator's death, and was not made in the presence of and witnessed by three witnesses. Consequently in respect to that gift *The Religious, Educational and Charitable Institutions Act* has not been complied with, and

the same result follows as in *Swan's Case*—namely, that so far as St. Paul's Church is concerned the bequest fails, and the answer to the alternative of the first question—(1) Does the said testamentary disposition take effect? or does the same fail?—will be "Yes." As to the third question—By whom and out of what funds ought the costs of this case to be paid?—I think that all the costs should come out of the estate of Adair and that the trustees should have their costs as between solicitor and client.

COOPER, J.: I am of the same opinion for the same reasons.

REAL, J.: I am of the same opinion. This is a matter in which I have no doubt as to the law myself, but if it had been brought up in the first instance it might not be free from doubt, but it is governed by the decision in the case of *Swan's Will*, and by the reasoning in that case. Two possible interpretations might be given to an Act authorising a religious body to become incorporated. One is that it was a mere accession and increase to the rights which they have as organizations recognised by law. At the time of the passing of this Act the Presbyterian Body had in common with all other religious bodies the protection of the general law, which enforced and protected all gifts not made contrary to the specific provisions of the law made for charitable purposes in favour of any religious or educational body, unless such religious body was of a class proscribed by law. The law in England of course varied, and there were times when the religious bodies now receiving protection did not receive it. But the principle was that whenever a religious or charitable bequest was given, the effect was that it was carried out in substance, but there was no certainty unless a corporation existed too. It was the Court of Chancery that had control of the trust, and from time to time appointed trustees, and application had to be made to it where there was an attempt by the trustee to commit any breach of the trust, or if it was not lawful to carry out the objects of the trust. That was the law as it existed before the passing of this Act,

when an additional right was given to the Presbyterians, in addition to those given by the statutes, 8 Wm. IV, No. 7, and 4 Vic, No. 18, enabling them under certain circumstances to practically have a corporate succession. They were recognised as one body under those Acts. The contention in this case, so far as I understand it, has been that this Act did no more than give to the religious bodies another privilege without in the slightest degree limiting the powers and authorities they already had, if they chose to take advantage of them. That is to say, that the effect of a will not being in accordance with the forms of this Act would be, that it stood as before the Act was passed, and could not be given effect to. If that were the true construction, the provision in section 3 would be useless, and I might say to my mind absurd, because section 3 provides that any gift to a body endowed with the rights of succession given by this Act, will be invalid if it is not registered one month before the person who made it dies. The law which has been applied to charitable institutions in England, and as applied to *The Mortmain Acts*, which necessitated gifts being made in some reasonable time—as pointed out by the learned late Chief Justice in *Swan's Case*, limited the time in England to twelve months, but here it is limited to a period of one month. Now if this Act is to be construed as merely giving to them a further right, that provision would be perfectly useless and absurd. Then it is contended that some different rule of construction must be applied when the institution that registers consists of several congregations or bodies. I can see nothing in the Act which would lead to that construction. It has to be borne in mind that at the time this Act was passed many of the religious bodies were separated by the state of the Colony in a great measure, and this body—the Presbyterians—the gift to whom is now under consideration, had grants of land made to them by the State, which were under various Acts, vested in trustees or otherwise. The Act provides (section 1)—“It shall be lawful for the Governor, with the advice of the Executive Council, from

time to time, to issue letters patent under the seal of the Colony, and therein to declare that any person or persons, and their successors for ever, holding any religious or secular office or preferment, or exercising any religious or secular functions to which he or they shall have been duly called, in accordance with the rights, laws, rules or usages of the community or institution to which such person or persons should belong, shall be a body corporate by such name and style as may in and by the said letters patent be given to such corporation, and such person or persons shall by that name have perpetual succession, and a common seal, etc.” It has to be observed that the persons to whom those letters patent have to be issued are to be persons “duly called or appointed in accordance with the rights, laws, rules or usages of the community or institution.” Therefore whether it consists of one congregation or of many it does not matter. As has been pointed out by Mr. Justice Harding, some consist of one congregation having everything in themselves. The Presbyterians, the Church of England, Roman Catholics, and probably many others having that class of organisation, consist of one church with many congregations, but whether they consist of one church with many congregations they can only be registered under this Act as one community. They may be parts of a whole. The different members of a congregation are parts of the congregation, and in the same sense may different congregations be parts of the whole church, but they are and can only be registered as officers of one congregation, those officers representing not merely the persons, the delegates who elected them, but the persons who are represented by those delegates—that is the head. These persons take it for the body corporate, or community, or institution to which such person or persons belong. There is nothing therefore that I can see in the Act which can possibly be said to exempt the parts from the provisions that are made as to the whole, but there is a clause with regard to the necessity for registration which would become futile, and be rendered ridiculous

if this could happen, that if a person making a will in the goodness of his heart, confined himself not to the particular congregation to which he belonged himself, but to the whole of the congregations of the Presbyterian Church in Queensland, and enumerated them one by one, it could be said that it must necessarily follow that if he only enumerated five out of six it would be good, or that if he only enumerated one it would not be good. Could it be said to be the policy of the Act that a gift to five out of six would be valid, would be good, but if immediately before the man died he included a sixth, and it was not registered one month before he died it would be invalid? That is the construction we would have to give to the Act to hold that a gift to one is good, and a gift to more than one bad. I see nothing in the Act which would lead us to give anything more than the natural construction to section 3. I therefore think that the law has been correctly laid down in the case of *Swan*. It is a plain and simple rule. If it means anything else it is for the Legislature to say it. I see nothing to justify us in differing from that case. One case that has been relied upon was that of *Jane Mortimer*. In that case there were two gifts, one to the Congregational Union, and one to the Ann Street Presbyterian Church. That was an application in Chambers, and the gift was allowed to the Ann Street Presbyterian Church, but not to the Congregational Union. Even if that is so, I can only take it that it was allowed in consequence of the peculiar terms of the affidavit in which the facts were not strictly stated. There was no affidavit as regards the Presbyterian Church, though the Ann Street Presbyterian Church is a further church with reference to which an Act of Parliament has been passed in 1889. That is a private Act, and it shows in what way the parties themselves looked upon the effect of *The Religious, Educational and Charitable Institutions Act*, and in what way it has been acknowledged by Parliament to be understood. The preamble to that Act states the Ann Street Presbyterian Church now forms a part of, and is subject to the jurisdic-

tion of, the Presbyterian Church of Queensland. And then again s. 3 of that Act states—"from and after the passing of this Act it shall be lawful for the trustees in whom the lands for the time being are vested, to sell or mortgage the whole or any portion of the said lands, with the consent of the Presbyterian Church of Queensland in general assembly constituted, hereinafter styled 'The Corporation.'" That shows how the Ann Street people, who are the persons in whose case it is said the gift was held to be valid, regarded it. But it is exactly in the same position to the Presbyterian Church of Queensland that this particular body stands in. They are to form a part of and are subject to the jurisdiction of the Presbyterian Church of Queensland. They form part of the corporation. They say afterwards that their land which is vested in trustees under the former Act is to be disposed of to the Presbyterian Church of Queensland in general assembly, hereinafter styled the corporation; that is to say officers who have been elected, and whose letters patent we have had presented to us in this case constitute a corporation. Then again in section 8 the particular trustees are empowered to do certain acts, and they are to transfer the surplus to this corporation, who are to hold it for the benefit of that particular church. I say this only shows that this is the view, so to speak, which Parliament has taken of the provisions of the Act. That is the view which the various members of the bodies themselves took of the provisions of the Act, but that is not precisely the view that they presented to the Chief Justice when they applied to pass these accounts. There they state they are part of and are subject to the jurisdiction of the Presbyterian Church of Queensland, hereinafter called the corporation. However, it is not in a matter in which the judgment would be binding, but still we always pay respect to, and we took the trouble of looking at, this case to see if we could discover anything to assist us in the interpretation of the law; but so far as I can find, the affidavits, so far from throwing any light which would give any limitation of the rule of law laid

down in *Swan's Case*, show a reason why to the mind of the Judge *Swan's Case* would not apply. The principle is practically this: If you give to a part of a corporation you are within the scope of the Act, which necessitates it being made in a manner prescribed by that Act. Thus not being registered, the gift therefore fails, and I agree with my brother Judges that all parties should have their costs out of the estate, and the trustees their costs out of the estate, as between solicitor and client.

Costs of all parties as between solicitor and client were allowed out of the estate.

Solicitors for executor: *Unmack & Fox*.

Solicitors for next-of-kin: *Chambers, Bruce & McNab*.

Solicitors for other defendants: *Hart, Flower & Drury*.

MURISON v. RANKIN.

District Court—Appeal—New trial—Notice—Illegal distress—District Courts Act (55 Vic., No. 33), ss. 132, 144, 145, 147—Set off—Small Debts Court judgment.

M. rented a house from R., and had also business transactions with him. M., being desirous of determining her tenancy, handed the key of the premises to R., and removed her furniture to another house. At that time M. owed £2 for rent, and a larger sum for goods supplied by R. R. distrained upon the furniture so removed. M. brought an action for illegal distress, and R. pleaded by way of set off a judgment in the Small Debts Court against M. in favour of R. The jury found that the distress was not illegal, and Miller, D.C.J., on 18th September, entered judgment for R. on the set off. Notice of appeal was given within the prescribed time, but the appeal was not set down for hearing before the December Sittings of the Full Court.

On appeal it was objected that the appeal was out of time, and that in any event an application for a new trial should have been made to the District Court.

Held, that the appeal was within time, and that under s. 144 of *The District Courts Act* the Supreme Court has jurisdiction to hear an appeal in any of the cases specified in that section, in which the party is dissatisfied with the judgment of the District Court, although the proper ruling may be a new trial only.

Held also, that as upon the admitted facts the distress was illegal, there must be a new trial.

A judgment of a Small Debts Court cannot be sued upon, nor raised as a defence by way of set off, in the District Court.

APPEAL from a judgment of Miller, D.C.J., in an action for illegal distress, tried at Maryborough. Mary Ann Murison, a married woman, occupied a house at Maryborough belonging to the defendant Rankin, a butcher, with whom she also had business transactions. She gave Rankin notice of her intention to give up the house, removed her furniture, and handed Rankin the key of his house in terminating the tenancy. She then owed £2 for rent. Prior to that she had signed a promissory note for £28 6s. 2d., payable in six months, for the whole of her indebtedness to him. Rankin accepted the promissory note, but afterwards told her he could not wait so long, and persuaded her to sign an I.O.U. for £29. He retained both documents, and next day put a distress into the house to which the appellant had removed. The formal warrant was not signed until a day after the distress. The promissory note included the sum of £16 for rent and goods supplied. The plaintiff brought an action for £100 damages for illegal distress, and the defendant pleaded by way of set off a judgment in the Small Debts Court for £12. The jury found that the distress was not illegal, but that it was excessive and irregular. They also found there was an unsatisfied judgment of £12 12s 2d. against the plaintiff. Miller, J., gave judgment for the defendant for £10 17s. 8d. The plaintiff appealed.

Lilley, for the respondent, took the preliminary objections to the appeal being heard (1) that this was an application for a new trial, and ought to be made to a District Court Judge; (2) no appeal lies on a question of fact; (3) no point was taken or raised in the Court below before the Judge; (4) no note was taken of any question below by the Judge; (5) the appeal was out of time. The judgment was pronounced on 18th September, notice of appeal was given on 30th September, and the appeal ought to have been set down for the October sittings of the Full Court.

GRIFFITH, C.J., referred to *B. v. JJ. of Oxfordshire*, 1 M. & S., 448.

Byrnes, A.G., and *Macgregor* for the appellant, submitted that it was unnecessary for the appeal

to be set down for hearing at the October Full Court. Notice of appeal was given within the prescribed time. It is not always possible to get signed copies of the Judge's notes, as the Judges are often away on circuit for a long time.

The Court decided to hear the appeal.

Byrnes, A.G.: The distraint was illegal from its inception. *Gray v. Stait*, 11 Q.B.D., 668. The verdict was contrary to the evidence. The judgment of a Small Debts Court cannot be sued upon in the District Court. *Berkeley v. Elderkin*, 1 El. & B., 805; *Austin v. Mills*, 28 L.J. (Ex.), 40; *Simpson v. Rodd*, 6 N.S.W., S.C.B., 1.

Lilley submitted there could not be an appeal on a question of fact; that an application for a new trial should be made to the District Court Judge; that a note should be taken of the point raised; and where judgment was given an objection should be taken against it after it was delivered. *Rhodes v. Liverpool Com. Invest. Co.*, 4 C.P.D., 425; *Lathbridge v. Echlin*, 5 Q.L.J., 75; *Brown v. Book*, 8 Times L.R., 227; *Pierpoint v. Cartwright*, 5 C.P.D., 139; *Clarkson v. Musgrave*, 9 Q.B.D., 386; *Smith v. Baker* (1891), A.C., 325. There was no evidence that the appellant, who was a married woman, had separate estate, and a nonsuit ought to have been granted. [REAL, J.: She swore she was a midwife, and kept her husband]. It was not proved that the goods distrained upon were her separate property. As to the illegality, there was no definite notice of the determination of the tenancy beyond giving back the key, and there was ample evidence that the warrant was signed before the distress was levied.

GRIFFITH, C.J.: This is an appeal from the judgment of the District Court Judge at Maryborough in an action for illegal distress. The defendant pleaded by way of set off a judgment in the Small Debts Court. The facts as they appeared at the trial showed that the distress was in point of law illegal, and that plaintiff was therefore entitled to succeed in the action. The damages would have been the value of the goods when they were unlawfully sold. In answer to

questions left by the learned Judge to the jury, which we must assume to have been left with proper directions, the jury, notwithstanding the admitted facts, found that the distress was not irregular but not illegal or excessive. The learned Judge, after argument, reserved judgment, and finally gave judgment for the defendant for the amount of the Small Debts Court judgment, after deducting the net proceeds of the distress. The plaintiff appeals against that judgment, and that appeal is met with, first, the objection that no sufficient note was taken in the Court below of the questions of law raised at the trial, as required by sec. 145 of *The District Courts Act*. It appears from the Judge's notes that one of the questions left to the jury was whether the distress was illegal. The illegality of the distress is part of the cause of action stated in the plaint. I think, therefore, that the illegality of the distress was a point of law raised in the Court below. On the other point—the set off—plaintiff claimed judgment in her favour, notwithstanding the judgment against her in the Small Debts Court. That point was clearly brought before the learned Judge. I think that both these points were raised before him, and sufficiently appear on his notes. The object of the 145th section of *The District Courts Act* was, as pointed out in *Clarkson v. Musgrave*, that a point must be taken at the trial when it might be cured by evidence, and ought not to be taken for the first time before the Court of Appeal upon notes sent up for the purpose of raising another and a distinct point of law. I think, therefore, that this objection fails. Another objection is made to the hearing of the appeal, on the ground that this Court can not entertain an appeal from the District Court, the object of which is merely to grant a new trial; and it has been pointed out correctly that the District Court Judge has power to grant a new trial. The main objection to the verdict in this case was that the verdict was perverse and that the plaintiff was clearly entitled to substantial damages. The jury found, nevertheless, that she was not. *The District Courts Act of 1867*, sec. 109, provided that

if either party to an action for more than £30 was dissatisfied with the determination of the Court in point of law, or upon the admission or rejection of any evidence, he might appeal to the Supreme Court, and the English Act quoted in the margin contained similar words. Section 144 of the present *District Courts Act* omits the words "in point of law," and says, simply, that any party who is dissatisfied with the judgment of the Court (in certain cases) may appeal to the Supreme Court. I think that the intention was to extend the right of appeal previously existing, or to give a remedy which in many cases would be more speedy. In some parts of the colony the District Courts do not sit for long intervals of time, and it may well have been intended that there should be speedy redress in all cases where clear injustice has been done. There is no reason *prima facie* why this Court should not entertain appeals from the District Court in any case in which it would entertain an appeal from a decision of a Judge of the Supreme Court, whether the case was tried with a jury or without one. Full effect is given to section 145 of the Act by holding it to have that meaning, and I do not see any reason for limiting its meaning, or excluding the power of this Court to hear appeals in any of the specified cases in which a party is dissatisfied with the judgment of the District Court. The plaintiff comes here and says she is a dissatisfied person. She is rightly dissatisfied, inasmuch as the judgment, which necessarily follows the verdict, is plainly contrary to the merits of the case. I think, therefore, that this Court has jurisdiction to hear her appeal, and as the distress was clearly illegal, she was entitled to substantial damages. The appeal should be allowed. On the other point, the cases of *Berkeley v. Elderkin* and *Austin v. Mills* show that a judgment of the Small Debts Court cannot be sued upon in the District Court, or be set up as a defence by way of set off or counter claim in an action in the District Court. I think, therefore, that the appeal ought to be allowed, and that there should be a new trial. It has been held in England that in these cases

the costs should follow the result, otherwise the relief would be valueless. I think the appeal should be allowed with costs, and a new trial granted.

HARDING, J.: I am of the same opinion, and of the same opinion that I was in *Lethbridge v. Ecklin*, cited in 5 Q.L.J., 75. In this case the point brought before the Court appeared to have been raised below, and also appeared to me to appear sufficiently on the Judge's notes, as what is there stated as having taken place could only have taken place upon this point being so raised. An appeal to this Court is given by section 144 of *The District Courts Act* in an action when the subject matter exceeds £30; and by section 147 the power, on hearing such an appeal, is given to the Supreme Court to order a new trial, but by section 132 of *The District Courts Act* a District Court Judge may order a new trial. It seems, therefore, that until this is done the judgment is final and conclusive between the parties, and is the subject of appeal under section 147. As a general rule, the motion for a new trial should be made in the first instance to the District Court, and this omission will be at the peril of costs on not showing special circumstances justifying its being brought to this Court in the first instance, such special circumstances being, for example, the length of time which might have to elapse before a motion could be made to a District Court Judge, or that an appeal would also combine some other ground of coming to this Court for relief. The subject matter of the cross action being the Petty Debts Court judgment, it is not a matter of set off in the District Court. Consequently, the judgment, so far as that is concerned, should be set aside; and I should say that the order should be: Set aside the judgment, or appeal allowed and new trial granted.

REAL, J.: I am of the same opinion for the same reasons.

Solicitors for plaintiff: *Lilley & O'Sullivan*.

Solicitors for defendant: *Powers & Robinson*.

In the matter of The Stamp Duties Acts of 1866 and 1890, and in the matter of A NOMINATION OF TRUSTEES TO T. E. WHITE AND ALFRED SHAW AS TRUSTEES FOR ALFRED SHAW AND COMPANY, LIMITED.

Foreign company — Non-registration — British Companies Act of 1886 (50 Vic., No. 31), s. 10—Real Property Act of 1861 (25 Vic., No. 14), ss. 77, 82—Nomination of trustees—Stamp Duties Act of 1866 (30 Vic., No. 14), s. 27—Agreement—Conveyances.

A document in form of a nomination of trustees from T. E. White and Alfred Shaw to T. E. White and Alfred Shaw as trustees under *The Real Property Act of 1861* for Alfred Shaw and Company, Limited, was tendered to the Stamp Commissioners to fix the duty payable. The transferors and transferees were identical. The Commissioners considered it a conveyance, and demanded duty accordingly, while the trustees claimed that it was liable to nominal duty only as an agreement.

Held, that the instrument was in law invalid as a transfer, and did not require stamp duty, but that it could not be registered as a transfer without payment of stamp duty.

SPECIAL case stated for the opinion of the Court under the 21st section of *The Stamp Duties Act of 1866*. The matters on which a decision was desired were—(1) Whether an instrument declared by the Stamp Commissioners to be a conveyance, and liable to duty as such, was a conveyance or an agreement within the meaning of the Act; and (2) if the instrument was a conveyance, was it liable to *ad valorem* duty on the full value of the property therein described, or was it only liable to nominal stamp duty. The instrument referred to was entitled a nomination of trustees from Thomas Edward White and Alfred Shaw to Thomas Edward White and Alfred Shaw as trustees for Alfred Shaw and Co., Limited. The firm of Alfred Shaw and Co., of Brisbane and Melbourne, consisted, on 1st June last, of five persons, namely:—Alfred Shaw, T. E. White, A. H. Shaw, B. H. Taylor, and J. J. Moore. They carried on business in both places as ironmongers and hardware merchants. On 15th September last the partners

formed themselves into a limited liability company under the title of Alfred Shaw and Co., Limited. They registered the company in Melbourne, but not in Queensland. Certain of the property here stood in the name of A. Shaw and T. E. White at the Real Property Office. The nomination of trusts was executed for the purpose of declaring that the Brisbane property should be held in trust for Alfred Shaw and Co., Limited, their heirs and assigns, for ever. The instrument was tendered to the Stamp Commissioners. For the purposes of the case the land in question had been taken as worth £8,075. The Stamp Commissioners, taking the instrument to be a conveyance of that land, had demanded duty to the amount of £80. The appellants paid the sum under protest, and deposited in court the sum of £10 as costs of the proceedings.

Lilley, for the trustees, contended that the deed was not a conveyance, inasmuch as it did not pass the property to anyone. It merely declared a trust in favor of the company. No estate passed by the instrument. Messrs. T. E. White and Alfred Shaw were trustees, and they simply placed on record the fact that they were trustees. It was not a conveyance. Nothing passed to the company. The land did not vest in anybody by the instrument. [HARDING, J.: If the company is unregistered in Queensland, it has no power to hold land here. If a conveyance were made to an unincorporated body, the land would vest in the Crown.] The question of the Crown's right did not arise. It might when they sought to make a conveyance. [REAL, J.: If the property goes to the Crown by declaration of trust you would not have to pay stamp duty.] The land would not go to the Crown, *Barrow v. Wadkin*, 24 Beav., 20. At present the company was merely an entity, and could not hold land in Queensland. It could not hold an equitable interest under *The Real Property Acts* until it was registered, and then it had a right of action on the declaration of trust. The company could take a legal estate even for the purpose of passing it to the Crown through escheat, therefore it is not a conveyance.

[REAL, J.: On that basis the instrument is a myth.] The instrument was evidence of a declaration of trust in favour of the company, and as soon as the company was registered they could sue upon it. If nothing passed to A. Shaw and Company, Limited, under the agreement of 1st June, the thing might be a nullity. [HARDING, J.: The Crown might have a right to hold it. REAL, J.: If you can neither take the land nor the use it is a nullity. You can't come here when you don't exist. A British company may enter into as many negotiations as they like to acquire land, but it cannot make a binding contract until it is registered. S. 10 of *The British Companies Act*.] Until registration the company has the right to have this declaration of trust put on the register. It has been decided here that if a document in form of a transfer is presented to the Registrar he could not refuse to register it. When they get to the registration stage they would have to pay stamp duty, but if they had to pay on the declaration of trust they would have to pay twice over. [GRIFFITH, C.J.: Why did you take it to be stamped?] Because it is subject to nominal duty as an agreement. There is no attempt to evade stamp duty. When the trustees convey to A. Shaw and Co. they will have to pay stamp duty on the conveyance. The decision of the Commissioners that this instrument was a conveyance is erroneous, and should be revised, and the money paid should be returned to the persons who lodged it.

Byrnes, A.G., and Sydes, for the Stamp Commissioners, stated that the Commissioners had decided that the instrument being in form a conveyance was liable to duty. Points had been raised as to the validity of the document. The instrument seemed to be neither an agreement nor a conveyance.

GRIFFITH, C.J.: The instrument in this case is in form a nomination of trustees from Thomas Edward White and Alfred Shaw to Thomas Edward White and Alfred Shaw as trustees under *The Real Property Act of 1861* for Alfred Shaw and Co., Limited; and if it were taken to

the Registrar of Titles as such he would be justified in registering it, but before doing so he would be bound under section 77 of *The Stamp Duties Act* to see that it was duly stamped as such an instrument as it purported to be when presented to him for the purpose of transfer. It could not be registered by the Registrar of Titles until stamped as a transfer. The Court is now told that the Thomas Edward White and Alfred Shaw the transferors are the same as the Thomas Edward White and Alfred Shaw the transferees, so that the instrument, being an attempted transfer from the transferors to themselves, does not operate as a transfer at all. On the facts presented to us it appears that it is not a transfer nor even an agreement, but only evidence of an agreement, and does not require any stamp. But if the appellants go to the Registrar of Titles and represent to him that it is a valid transfer, he will not register it until it bears a proper transfer stamp. Although, therefore, on the facts as now stated, the instrument does not appear to require any stamp, the appellants cannot make use of it for the purpose of registration without stamping it.

REAL, J.: I am of the same opinion. The instrument is clearly not a transfer or conveyance within the provisions of *The Stamp Duties Act*, and not a transfer within the meaning of *The Real Property Act*. But, as pointed out by the learned Chief Justice, it is in form a transfer, and were it not for the information given to us that White and Shaw are identically, and the transferors and transferees are identically, the same persons, of course it would have to be treated as a transfer, and it would be liable to the stamp duty on transfers. Being identical persons, it has not been seriously contended by the appellants, nor by the representatives of the Commissioners, that it is a document which is authorised by sections 77 and 82 to be registered, but it appears to be the practice to register such documents. And why the Registrar of Titles registers them is that it has been decided in this Court that when a document is presented in form a transfer, he is

not permitted to ascertain by evidence anything about it, consequently this document presented to him would be a nomination of trustees by persons who happen to have the same name. We are informed that as a fact they are identical. Consequently we are put in possession of facts which show that the instrument does not come within the provisions of sections 77 and 82 of *The Real Property Act*, and therefore not an instrument of that description. But these are circumstances which, on its presentation to the Registrar of Titles, did not come before him, and coming before him as an unstamped instrument for the nomination of trustees, he was justified in refusing to register it. Therefore I think the particular instrument is not liable to stamp duty.

HARDING, J.: It is neither a conveyance nor a transfer, and cannot be registered without stamps. No costs on either side should be allowed. The duty and deposit ought to be returned.

GRIFFITH, C.J.: The appellants succeed in point of form, and must get their deposit back. The first question is answered—"neither; but it cannot be registered unless stamped *ad valorem*." The deposit will be returned; no costs allowed.

Solicitors: *Lilley & O'Sullivan*.

Solicitor for Commissioners: *J. Howard Gill*.

WILSON v. HARVEY AND SONS.

Negligence—Ferocious Bullock—Scienter.

Cattle were being driven from a station to Charters Towers under the care of three drovers in the defendants' employment. When near the town, a bullock made a charge at a child, who escaped. A little further on, it became impossible to get the bullock along, and H decided to shoot it. He borrowed a gun and fired at it twice. The bullock fell, but was not killed. It got up and ran towards the house of W, who, attracted by the noise of the gun, came out to see what was the matter. He was gored and knocked down by the bullock and injured. The bullock was subsequently shot.

Held, that there was evidence of knowledge that the animal was dangerous before the injury, and that as during that time the defendants' servants drove it through a populous town, and did not take precautions for the protection of the public, the defendants were liable for negligence.

MOTION to set aside a judgment of Chubb, J., and

notwithstanding the findings of the jury, to enter a verdict for the defendant, or in the alternative that a judgment of nonsuit should be entered, or that a new trial should be entered on the grounds that (1) the findings of the jury were against the evidence adduced at the trial; (2) that such evidence entitled the defendants to judgment; (3) that the Judge omitted to give proper and sufficient directions as to the negligence of the defendants.

The action was brought by Charles Sydney Wilson, a foreman of workmen employed at a goods-shed in Charters Towers, against J. Harvey and Sons, butchers, at the same place, for injuries caused by being knocked and gored by a bullock belonging to the defendants. On 12th September, three drovers started at daylight from a station eighteen miles from Charters Towers to drive twenty-seven head of cattle to Charters Towers. About 4.30 p.m., when a short distance from the town, a red bullock in the mob became tired and would not go on. The animal was stubborn, and when near the town made a charge at a child, who escaped. Then the bullock tried to get away, but as it was impossible to get it along, Harvey borrowed a gun from a man White, and fired at the bullock, which staggered. Harvey fired again and brought the animal to its knees. Thinking he had killed it, Harvey got off his horse and went towards it. The bullock, however, got up and ran towards a creek near White's house. Harvey handed the gun to a man named Morrison, who followed the animal and fired another shot at it. Morrison fired again and killed it. A man named Wilson, attracted by the shots fired by Harvey, had left his house to see what was the matter. It was then dark. As Wilson approached the spot, he saw the bullock coming towards him, its eye shining like that of a wild beast. The bullock knocked him down, gored him, and ran on a short way. Wilson crawled along and escaped in the dark. He was injured, and incurred expense for medical attendance. The jury found for the plaintiff with damages and judgment was entered accordingly.

Lilley for defendants, submitted that there was no evidence of firing in a negligent way. The defendants had a perfect right to drive bullocks along a road into town. [HARDING, J.: You got into town and shot a bullock at large. You brought the bullocks at your peril.] Not unless we knew the bullocks were dangerous. The bullock did not get at all wild till near the town. There was no other means of killing it. There was no evidence that, when it was found the bullock was wild, they omitted to do anything to prevent danger to the public. [GRIFFITH, C.J.: There is some evidence that some time in the afternoon you found he was not a tame bullock. HARDING, J.: It is a matter of common knowledge that country bullocks brought into a town are not safe.] *Applebee v. Percy*, L.R., 9 C P., 647; *Bloming v. Orr*, 2 Macqueen's Ap., 14, 23.

Power, for the respondent, was not called upon.

GRIFFITH, C.J.: There was evidence before the jury on which they might reasonably find that the defendants' servants knew that the animal was dangerous, and might do injury. It was dangerous at least an hour and a half before the injury was done, and during that time, instead of taking precautions, the defendants' servants drove it through a populous town. Under these circumstances it seems to me that there was evidence of knowledge on the part of the owner's servants that the animal was dangerous, and that they ought to have taken precautions for the protection of the public, but did not. On that ground I think the appeal fails, and must be dismissed with costs.

HARDING and REAL, JJ., concurred.

Solicitor for appellant: *Hellicar*.

Solicitor for respondents: *Down*, agent for *Costello*.

UNION BANK OF AUSTRALIA, LIMITED v. RAINE.

Appeal—New trial—Practice—Security for costs—O. LIV, r. 1—Guarantee—Amendment of pleadings.

R. signed a continuing guarantee for an overdraft by the Union Bank to B. up to £250, and agreed to lodge the certificates for certain shares belonging to B.,

which were transferred into R.'s name, as collateral security for the overdraft. B. subsequently wished to obtain the shares, and R. gave him an order on the Bank for the delivery of the certificates. B. took the certificates from the Bank, had the shares re-transferred into his own name, and relodged the certificates with the Bank. No reference was made to the guarantee. On 11th July, 1893, the Bank issued a writ against R. upon the guarantee, the overdraft then exceeding £250. On 13th July the Bank sold certain of the shares for £256.

On the pleadings, the defendant R. denied the execution of the guarantee, and pleaded that if it was executed its execution was procured by fraud. The facts above stated appeared upon the evidence for the plaintiffs. At the close of the evidence the defendant applied for leave to amend by setting up the defence that the guarantee was satisfied. Chubb, J., refused leave to amend, and judgment was entered for the Bank on the findings of the jury.

Held, on appeal by Griffith, C.J., Harding and Real, JJ., that as on the plaintiffs' own case the questions arose whether the deposit of the certificates was for the benefit of R. or the Bank, and whether the guarantee was given on the understanding that it was to be given up as soon as the certificates were re-deposited with the Bank, and as neither of these questions had been left to the jury, there must be a new trial, with leave to the defendant to amend as he might be advised.

It is not the practice of the Court to require security for costs on an application for a new trial, except under very exceptional circumstances.

Motion that a judgment of Chubb, J., in favour of the plaintiffs should be set aside, and that, notwithstanding the findings of the jury, judgment should be entered for the defendant on the ground that the entry of judgment was contrary to law, or that, in the alternative, a new trial should be granted.

This was an action on a guarantee tried before Chubb, J., and a jury at Charters Towers. Brown was a customer of the Union Bank in 1889, and held 1,950 shares in a Pyrites Company at Charters Towers, which had been lodged by him with the Bank as security for his overdraft. Brown being threatened with legal proceedings interviewed Mr. Bryant, the manager of the Bank, and it was arranged that Raine should sign a continuing guarantee for Brown's overdraft up to £250, and that Brown's shares in the Pyrites Company should be transferred to Raine and lodged as collateral security for the overdraft. The shares were

accordingly transferred into Raine's name, and the certificates were lodged by him with the Bank. Mr. Bryant in his evidence said—"the shares were redeposited, and were held as collateral security for the guarantee." In November, 1889, Brown wished to have the shares retransferred to himself, and induced Raine to give him an order on the Bank for delivery of the certificates to him. Brown then had them transferred to his own name, and again lodged them with the Bank. No change was made in the arrangement as to the guarantee, but the shares held as collateral security thereafter stood in Brown's name. Brown's overdraft subsequently exceeded £250, and he was pressed for payment. A writ was issued against Raine on 11th July, 1898. On 17th August the Bank sold 1,800 of the Pyrites Company's shares for a sum sufficient to satisfy the guarantee. The foregoing facts appeared in the course of the plaintiffs' case. The statement of defence denied the making of the guarantee, and alleged that, if it had been made, it was obtained by fraud. At the close of the evidence the defendant's counsel applied for leave to amend, and "to plead a set off as a satisfaction by the fact of the Bank having received as security from Brown certain shares which they have sold for £350." Chubb, J., refused leave. The jury found for the plaintiffs, and judgment was entered accordingly. The defendant appealed.

Byrnes, A.G., and *Feez*, for the respondents, applied for security for costs. O. LIV, r. 1. The appeal was not *bonâ fide*, an abuse of the process of the Court. *Skinner v. Oribb*, 1 Q.L.R. (pt III), 59. The appellant has committed an act of insolvency in failing to point out sufficient property to satisfy an execution. [GRIFFITH, C.J.: In what suit?] On this judgment. *Hawkin v. Turner*, 10 Ch. D., 372.

GRIFFITH, C.J.: Without laying down any absolute rule that under no circumstances will a person applying for a new trial be required to give security for costs, it may be taken to be the practice of this Court that such an order will not be made except under very exceptional circum-

stances. Such circumstances do not exist in the present case. The motion is therefore refused. The question of costs will be reserved until the appeal has been heard.

Lilley for the appellant, submitted he was prevented from raising the real question at issue. The shares sold ought to have been applied to paying off the guarantee.

Byrnes, A.G.: The defendant is now trying to make a new case. The issue was never raised at the trial. The defendant's Solicitor wrote, after being invited to inspect the bank book entries, that if it would save expense his client offered that if the guarantee was upheld he would consent to judgment being given against him for £250. The Court will not interfere with the Judge's discretion, *Byrd v. Nunn*, 7 Ch. D., 286.

GRIFFITH, C.J.: We express no opinion on the merits of the case. In the course of the plaintiffs' case, on the evidence of their own witness, the Bank Manager, who was practically the only witness for the plaintiffs, it appeared, to say the least of it, to be very doubtful whether the plaintiffs were entitled to recover against the defendant at all, and whether the obligation on which the plaintiffs were suing had not actually been discharged. That might have arisen in either of two ways. Certain shares were deposited with the Bank contemporaneously with the making of the guarantee sued upon. The Bank previously held the certificates for the shares, which then stood in the name of the principal debtor. The share certificates were taken away and the shares were transferred to the guarantor. The certificates were then redeposited and held under such circumstances that it was doubtful whether they were held by the Bank for the benefit of the defendant or entirely for their own benefit. A question also arose whether the guarantee was not really given on the understanding that it was to be given up as soon as the certificates were redeposited with the Bank. These questions arose on the plaintiffs' own case. At the close of the evidence application was made by defendant's counsel to amend the pleadings, and I think that the amend-

ment he asked for went substantially to raise these two questions. The language may not have been very formal, but in asking for leave to amend it is not necessary to ask in very formal terms. Substantially the application seemed to raise these two questions, either of which if raised and found in the defendant's favour would have entitled the defendant to succeed in the action. The Court is very loth to interfere with the exercise of a discretion by a Judge, but if the substantial questions between the parties have not been tried, it would be a denial of justice if the amendment were not allowed. We think that these amendments ought to have been allowed, and that these questions ought to have been left to the jury, and that under the circumstances there must be a new trial. And we give leave to the defendant to amend as he may be advised. With respect to costs, we think that the costs of the first trial should be left in the discretion of the Judge who tries the case again, and the costs of this appeal should be given to the defendant, not that he should enforce them at present, but when it comes to final judgment in the action the defendant will get them. The costs of the motion for security must be paid by the plaintiffs.

HARDING, J.: I am of the same opinion. It seems to me there were really two questions in the case—was the deposit of the shares for the benefit of the Bank or of the defendant Raine, or was there an agreement that the guarantee should be returned on the redelivery of the shares? One or other of these questions must exist in the case, and, according as the answer to either of these questions was, will be the result of the action. Now, if the question—was there an agreement that the guarantee should be returned on the redelivery of the shares?—was answered "Yes," then there would of necessity be a verdict for the defendant. That question was never tried by the jury. If that was answered "No, that it was not to be returned," then the other question—was the deposit of the shares for the benefit of the Bank or for Raine?—arose. That does not appear to

have been found by the jury. If it had been so found in favor of Raine, the jury should have been directed that if the amount of the shares exceeded the amount of the guarantee there should be a verdict for the defendant, and if it did not exceed the amount of the guarantee there should be a verdict for the plaintiffs for the balance of the amount after deducting the amount of the shares. Neither of these questions got to the jury. An application was made to the Judge to amend, which on the pleadings would have raised the questions, but that was refused. I am not satisfied that the amendment of the pleadings was necessary, but if it was not necessary it was necessary on the question to the jury—what was Raine indebted to the Bank?—for the Judge to point out to the jury that such questions did arise, and their answers in the affirmative or negative would show whether there was a debt or not. So that, whether the questions should have been raised at the trial by amendment, or by directions to the jury without amendment, I think that the matter did not come up and was not tried, and these being the real questions in the case the trial has failed, and there must be an order in the shape indicated by the Chief Justice.

REAL, J.: I am of the same opinion for the same reasons.

Solicitors for plaintiffs: *Macpherson & Fec.*

Solicitors for defendant: *Bernays & Osborne.*

FEBRUARY SITTINGS OF THE FULL COURT.

REGINA v. JACK.

Criminal Practice Act of 1865 (29 Vic., No. 13), ss. 48, 51—O. XXXI, r. 4—Appeal—Criminal Law Amendment Act of 1891 (55 Vic., No. 24), s. 4—Limitation of time—Arrest.

As a general rule, a Crown case reserved for the opinion of the Supreme Court will not be heard unless the papers are delivered to the Judges four clear days before the hearing, as prescribed by the Order XXXI, r. 4 (*Crown Rules*).

When a man is apprehended on a charge of an offence the nature of which is such that upon an information charging him with it he might be convicted of the offence with which he is actually charged in the information, that apprehension is a commencement of the prosecution for the latter offence.

On a charge of an offence under sec. 4 of *The Criminal Law Amendment Act of 1891*, proof by parol that the prisoner was apprehended on a charge, then stated to him, of rape on the same person held sufficient evidence of the commencement of the prosecution.

R. v. Phillips (R. & R., 369), explained.

CASE stated for the opinion of the Court by Miller, D.C.J.

The prisoner, an aboriginal, was tried at the Criminal Sittings of the District Court, at Rockhampton, on 9th January last, on a charge of attempted rape on a girl aged 4½ years. At the close of the evidence, which went to show that the offence was committed on 9th November, Mr. Lilley, who appeared for the prisoner, asked the judge to direct the jury to bring in a verdict of not guilty, on the ground that there was no evidence that the prosecution was commenced within two months of the commission of the offence. His Honour, in stating the case, said that the only evidence of the commencement of the prosecution was that of the arresting constable, who deposed that he arrested the prisoner on the 9th November on a charge of rape committed on the girl. No warrant or information was used in the initiatory proceedings, or produced or tendered in Court. At the Crown Prosecutor's request, His Honour allowed the case to go to the jury, and reserved the point for the Full Court. Prisoner was convicted, and His Honour remanded him for sentence until the next sittings of the District Court in Rockhampton, and in the meantime committed him to prison, allowing him bail if he could obtain it. The points for the consideration of the Court were:—

(1) Is it necessary for the Crown to prove in an offence under *The Criminal Law Amendment Act of 1891* that the prosecution was commenced within two months after the commission of the offence? (2) Was the evidence of the arresting constable sufficient to prove the date of the commencement of the prosecution?

E

Byrnes, A.G., and King for the Crown. Lilley for the prisoner.

GRIFFITH, C.J., pointed out that the papers had not been delivered four days before the sitting of the Court.

Lilley: I understand the judge who tried the case has been away on circuit, and the preparation of the case delayed. I ask the Court to waive the rule in this instance.

GRIFFITH, C.J.: Order 31, rule 4, provides that when a question is reserved by a Court of Criminal Jurisdiction for the Supreme Court the case is to be delivered to the Registrar, and that the Registrar, or if the question was reserved on the application of the prisoner's counsel the prisoner, must cause office copies of the case to be delivered to the judges and to each party four days at least before the case is to be heard. The object of the rule, of course, is that in a matter involving the liberty of the subject the judges may have an opportunity of reading the case at their leisure, and considering the points for decision before the argument. That being so, the rule ought to be observed unless satisfactory reason is given for the default in the delivery of the copies. In the present case the papers came direct from the judge, and it is to be presumed that he used all expedition in the matter, and in any case the parties ought not to suffer for any want of expedition on the part of the judge. As the question involves the liberty of the subject, I think we ought to hear the case, but it should be understood that as an ordinary rule cases will not be heard unless the papers are delivered to the judges four clear days before the case comes on for hearing.

Lilley submitted there was no evidence of the date on which the prisoner was first brought before the justices. He was arrested on a charge of rape, and there was no evidence that the prosecution was commenced until 9th January, when an information was presented in the District Court for an attempted rape. The arrest is not the commencement of the prosecution. *R. v. Phillips*, R. & R., 369; *R. v. Parker*, 33 L.J.

(M.C.), 185. Laying an information is the commencement of the prosecution. It is not always necessary to have a written information. S. 42 of *The Justices Act* says proceedings are to be commenced by a complaint. There was no evidence that the proceedings were commenced in that way. In *R. v. Hull*, 2 F. & F., 16, it was held that the issue of a warrant was not evidence of the commencement of the prosecution. *R. v. Brooks*, 2 C. & K., 402; 1 East, P.C., 186. The arrest was simply the detention of the person for the safety of the public. The prosecution commenced with the proceedings in Court.

King contended that the onus was on the prisoner to prove that the prosecution had not been properly initiated. The Crown prosecutors must be presumed to have performed their duties properly until the contrary was proved. [GRIFFITH, C.J.: I am not acquainted with any such rule.] The arrest is a step in the prosecution, and consequently the prosecution was commenced within the time prescribed by the Act.

Lilley in reply: The arrest might be a step in the prosecution, but it is no part of it. *Austin v. Dowling*, L.R. 5 C.P. 534.

GRIFFITH, C.J.: The prisoner was charged, under the 4th section of *The Criminal Law Amendment Act of 1891*, with attempting to commit an offence upon a girl under the age of 12 years. That section provides that any prosecution for any offence under it must be commenced within two months after the commission of the offence. It was contended by Mr. King that the onus was on the prisoner to show that the prosecution had been begun after the two months, but all the cases referred to were to the contrary effect. The general principle laid down is that the information must disclose the committal of an offence within the cognisance of the Court both as to time and place. It appears, however, that under such statutes it is not necessary to allege in the information the date of the commencement of the prosecution, but it also appears that when an objection has been taken that the prosecution had not been commenced within the

prescribed time, effect has been given to it. The evidence as to the commencement of the prosecution in this case is this:—Within six days after the offence was committed, the prisoner was arrested by a constable, who informed him that it was for an offence, which he described as rape, upon the child on whom the offence was committed. It was suggested that the offence, of which he was ultimately convicted, was not that on which he was arrested, but that difference does not constitute any objection if the prosecution was commenced within the prescribed time. It may be taken, therefore, that if the arrest of the prisoner on that charge was the commencement of the prosecution for the offence of which he was convicted, the prosecution was commenced in sufficient time. The contention for the prisoner was substantially that a prosecution must be commenced by laying a complaint before a justice, and that the apprehension of a prisoner on a charge communicated to him by the constable is no evidence of a previous complaint before a justice, nor of itself a commencement of the prosecution, nor a step in the prosecution. If that proposition were sustained, the conviction would have to be quashed. Consider the object of the statute. The offence is one which is easily charged, and substantial proof of which is soon lost, and it has often been said that it is hard to disprove. The object of this provision is to prevent stale charges, and to make the prosecution follow as soon as possible on the commission of the offence. What, then, is the meaning of "the commencement of the prosecution"? If we are bound by any decisions to hold that the term "prosecution" is a term of art having a technical meaning, we must follow those decisions. But the cases that have been cited do not appear to me to lay down any strict or technical interpretation of the term "prosecution." The earliest case was that in *East's Pleas of the Crown*. Then came the case of *R. v. Phillips* in Russell and Ryan. In the days when those cases were heard there was no Court for dealing with Crown cases reserved, but it was the practice for the judges to consult together and

to make a recommendation to the Secretary for State if they thought that a conviction should not be upheld. The words "commencement of the prosecution," used in the Queensland Act, are words often used in old statutes, and in construing their meaning regard must be had to what was the law about the commencement of prosecutions in those days. In 2 *Hgle's Pleas of the Crown*, p. 72, it is said: "Touching their arrests or apprehending them" (*i.e.*, offenders), "this is the first instance" (*i.e.*, beginning) "of their prosecution." The old doctrine of hue and cry is an illustration of the fact that the ordinary way in which a prosecution was commenced was by apprehension of the offender. I think, then, that we may very well understand that the Legislature when in the old statutes they used the term "prosecution" used it with reference to what was then understood to be the ordinary means of bringing an offender to justice, and that we are not precluded from holding that under this statute also the arrest was the beginning of the prosecution. That seems to be the ordinary meaning of the term, and this construction appears to be supported by the older authorities. The case of *B. v. Phillips, R. & R.*, 369, was relied on as authority against this view. The marginal note of that case is, "Proof by parol that the prisoner was apprehended for treason respecting the coin within the three months will not be sufficient, &c." On looking into the report itself, however, it appears that the head-note is inaccurate. The prisoner was apprehended on a charge of "high treason." At that time certain offences against the coinage law were made high treason by statute. All that the Court decided was that evidence of apprehension upon a charge of "high treason" generally was not sufficient evidence that the prisoner was apprehended for the offence against the coinage laws for which he was indicted. It appears in the present case that within two months of the committal of the offence the offender was arrested on the charge of rape on the same child. I think that it was a fair inference that he remained in custody on that charge until brought before the jury and con-

victed. It seems to me, therefore, that there was sufficient evidence that the prosecution was commenced, in the sense in which the term is used in the statute, within the time prescribed. On the grounds that I have stated, I think the conviction ought to be affirmed.

HARDING and REAL, JJ., concurred.

Solicitor for prisoner: *Chambers, Bruce, & McNab.*

BEGINA v. MANGIN.

Criminal law—Evidence and Discovery Act (31 Vic., No. 13), s. 64—Untrue representation—Confession.

M. was charged with having stolen certain gold, the property of the Mount Morgan Company. G., a private detective, who had worked himself into M.'s confidence, gave evidence that he told M. that he came from S. Africa, and had done business in diamonds, where a fellow could make a little money if he were so inclined. M. replied, "a man can make a little money here if he goes the right way about it." G. then, by means of false statements, induced M., by promising to participate in the gold robberies, to admit that he had in his possession some gold scraped from the Company's retorts. The statements were admitted to be false. The evidence was admitted, and the prisoner convicted.

Held, by Harding and Real, JJ., that these representations being untrue, and being made after the subject matter of the charge had been taken, all subsequent material confessions of M. were inadmissible in evidence, as being induced by such false statements, and that the conviction must be annulled.

CASE stated for the consideration of the Court by Miller, D.C.J.

The prisoner, Reuben Mangin, was tried in Rockhampton for having on the 14th September last, at Mount Morgan, stolen 1oz. 10dwt. of gold, the property of the Mount Morgan Company, and for having on the 20th of the same month, also at Mount Morgan, stolen 18oz. of amalgam and 2oz. 19dwt. 18gr. of gold belonging to the Company. He was convicted on both counts. The principal witness against him was F. W. Gabriel, a private detective employed by the Company. Gabriel had lived at the same hotel as the prisoner, and had by gradually working himself into the prisoner's confidence gained sufficient evidence to associate him with the gold stealing. In the course of the

trial he gave evidence, in which he stated that on the 7th September he had a conversation with Mangin, who asked him where he came from. By that time he was on familiar terms with Mangin. Gabriel said that he came from South Africa, where he had been doing a little business among the diamonds, and where a fellow could make a little money if he were so inclined. That statement he said in the witness-box was untrue, inasmuch as he had done business in diamonds, but not in South Africa. He continued to say that Mangin replied that—"A man can make a little money here if he goes the right way about it," and described how by representing himself to Mangin as a man who would participate in the gold robberies, he had induced him to admit that some gold in Mangin's possession had actually been scraped out of the retort at Mount Morgan. On Gabriel giving this evidence, Mr. Lilley, who was appearing for the prisoner, submitted that under the 64th section of *The Evidence Act*, the evidence was inadmissible inasmuch as the admissions from the prisoner were induced by untrue representations. A note of the point was taken by the Judge, and it was now brought under the notice of the Court on the special case stated by His Honour.

Lilley, for the prisoner: S. 64 of *The Evidence and Discovery Act* is peculiar to Queensland. The only decision on it is *R. v. Horrocks*, 4 Q.L.J., 218. The representation was untrue, and admitted by Gabriel to have been made to secure the prisoner's confidence. The ownership of the gold was not properly proved. There was no evidence, apart from the confessions, that the gold was taken without the consent of the directors. *R. v. Meehan*, 8 S.C.R. (N.S.W.), 289; *R. v. Thompson* (1893), 2 Q.B., 12; *R. v. Windsor*, 4 F. & F., 361; *Rex v. Parratt*, 4 C. & P., 570.

Byrnes, A. G., Power and King, for the Crown: The section does not apply to admissions made before there was any charge. Gabriel was a private officer, not a person in authority. The term "untrue representation" must be interpreted to mean any misrepresentation in connection with

the offence with which the man is actually charged.

HARDING, J.: This is a case stated by the learned judge who presided in the criminal side of the District Court holden at Rockhampton on 16th January last. The prisoner, Reuben Mangin, was on that day charged with the larceny of 1oz. 10dwt. of gold, and the larceny of 18oz. of amalgam and 2oz. 19dwt. of gold, said to be the property of the Mount Morgan Gold Mining Company, Limited. The case shews that, unless by means of admissions made by the prisoner, the case was not proved against him. The point more particularly raised by this case is as to the untrue statement which is said to have been made by Gabriel to the prisoner before the taking of the goods alleged to have been stolen. That statement was to the effect that he came from South Africa, and that he had been there doing a little business among the diamond fields. Now, nothing of the kind had ever occurred. Mr. Lilley objected to that. It was subsequent to that that the alleged confessions were made, upon which alone the conviction can be sustained. The learned judge states that there was no evidence or confession made by the prisoner to Gabriel after the untrue representation rightly admissible. The case does not set out other untrue statements made by Gabriel to the prisoner, but it attaches as part of the case the notes of the evidence, and from these there appears to have been a false statement made by Gabriel to the prisoner material to a prosecution, subsequently to that which took place with respect to the gold, which had been then taken and was then in the possession of the prisoner. Now, these facts being incorporated with the case, the second question raised by the judge—Was there any evidence that the property was taken without the consent of the owners?—arises. If that part of the evidence is read into the case, then this question raises that point—Was there any evidence that the property was taken without the consent of the owners?—because it is only by means of confessions, after such false statement as I have indicated has been

made, that any such evidence was brought out at all. So that I think that the point is open to us without deciding whether or no this statement about the diamonds so long before the occurrence could vitiate the matter, or be a good reason for reversing the judgment. Now, certain misstatements, which I do not find it necessary for a decision to point out, having been made by Gabriel to the prisoner, a certain amount of confidence having been established between the two, and arrangements having been made between them that they should obtain substances which are retortable into gold from the Company—that being the case, and substances having been actually obtained by the prisoner, this occurred:—On Wednesday, Gabriel says he saw Mangin at the hotel: "I produced some notes I went into his bedroom. He showed me some pieces of what I took to be gold, which he said he had obtained from the pipe of the retort. He put them into a small box which I gave him. He also showed me a pocket, which had been cut out of a pair of trousers, with some amalgam in it, weighing about 80oz. or 20oz. I told him he was getting some more gold. We then went into the bar." "I told him I was getting some more gold"—a false statement. "We went into the bar, and there met William Russell. All three of us went into Mangin's bedroom. On the way to the bedroom Mangin said, 'Are you sure Russell is all right?' I said, 'Yea.'" That is not true. There is a further misstatement. I think that after that, at all events, all statements made by the prisoner were affected by those untrue representations. "After this they went into the bedroom, and he (Mangin) produced a bag containing amalgam, and asked Russell to feel the weight of it." There is a confession that he had in his possession amalgam. "There was some conversation which I don't recollect. We went into the bar and had a drink. Russell left. Mangin then said if I had been here two months ago we could have made a couple of thousand pounds a month." There is another confession, if the jury put a certain construction on it. Further on we find

he says: "Going through the bar we found a man lying across the gateway named Joyce. He was drunk. I said, 'You can't have him here; take him into Mangin's room.' Mangin said, 'Do you think this fool is shadowing us?'" There is another confession—that is, if the jury chose to draw a certain conclusion from it. "I replied, 'It might be.' Mangin said, 'I will give you my swag to take care of to-night.'" There is another confession. "I saw Mangin at Mills' Hotel on the 21st (Thursday), and he showed me a piece of metal which he said *was stuff taken from the retort.*" Then there is other evidence to the same effect. As I have already said, that amounts to the making of a representation by Gabriel pertinent to the matter after the subject matter of the charge had been taken and the crime committed and completed, whatever it was. That being so, I think that the learned judge below was right when he did not think the evidence was admissible, but he admitted it on pressure from the Crown, subject to a case to be reserved. I think the evidence was wrongly admitted, and consequently that any conviction which followed upon it was bad. The form of the order should be that the judgment be annulled, and an entry be made on the record and on the indictment that the prisoner ought not, in the judgment of the judges, to have been convicted of the felony aforesaid.

REAL, J.: I am of the same opinion. The whole of the statements were made before any material admission had been obtained. All the representations were made by Gabriel before he got one very material admission—that he (Mangin) took it without the consent of the directors. That is the last thing of all. He appears to have held his hand until he got that admission out of him, and immediately after he had got it he handed him over to the police. That appears to have been on the 21st, on which day Mangin told him he would have got more, but the directors were there and he could not get as much as he liked. The next morning Gabriel gave him into custody. All the representations were made before he got that admission, and that is material evidence relied

upon in the case, as showing the taking of the property without the consent of the directors. We cannot see how far the jury relied upon that, but that alone would be sufficient to render the conviction bad. For the same reasons as those given by my brother Harding, I am of opinion that the judgment should be annulled.

HARDING, J.: Let the prisoner be discharged, and an entry made on the record and on the indictment that the prisoner ought not, in the judgment of the judges, to have been convicted of the felony aforesaid.

Solicitors: *Chambers, Bruce & McNab.*

MUNICIPALITY OF SANDGATE v. McLEOD.

Local Government—Rates—54 Vic., No. 24, s. 48—42 Vic., No. 8, s. 264.

A complaint for the recovery of rates was made by the Town Clerk of the Municipality of Sandgate. The Mayor ratified the action of the Town Clerk.

Held, that the complaint was rightly before the justices, and their order was upheld.

S. 264 of *The Local Government Act of 1878* is not impliedly repealed by s. 48 of *The Valuation and Rating Act of 1890*.

MOTION to quash an order for the payment of rates amounting to £6 14s. 5d. made by the Police Magistrate at Sandgate on a complaint laid by F. M. Lascelles, the Town Clerk of that municipality.

Fez, for the respondents, the Municipality, raised the preliminary objection that the proper parties were not before the Court. The information was laid by the Town Clerk without authority. *Twine v. Municipality of Dalby*, Full Court, February, 1892.

GRIFFITH, C.J.: The Municipality is the only party interested in maintaining the order.

Lukin, for the appellant Ellen McLeod, moved the rule absolute, and submitted that under s. 48 of *The Valuation and Rating Act of 1890*, and s. 264 of *The Local Government Act of 1878*, the Chairman of the Council was the only person who could lay the information. *Anderson v. Hamlin*, 25 Q.B.D., 221; *Queen v. Oubitt*, 22 Q.B.D., 622.

GRIFFITH, C.J.: This was a proceeding for the

recovery of rates due to the Municipality of Sandgate. Proceedings were taken under section 48 of *The Valuation and Rating Act of 1890*, which allows a local authority to recover rates upon the complaint of the chairman before two justices. The complaint in this case was made in writing by the Town Clerk, and it was objected before the Court below, and on the present application, that the complaint ought to have been made by the chairman himself. It appears to me that there are two answers to the objection, both arising from the same facts. At the hearing of the case a document was produced, signed by the Mayor of Sandgate, authorising the Town Clerk to represent the Municipality at any proceedings in the Court on the day on which those cases came on for hearing. That authority was based on the 264th section of *The Local Government Act of 1878*, which it followed in its terms, so that it appeared when the case came on and the town clerk appeared in support of this complaint, that he was acting in the matter with the authority of the Mayor. Apart, therefore, from any original authority of the Town Clerk to lay the complaint, it appeared that when the complaint came on for hearing before the justices his action was ratified by the Mayor. There was therefore a complaint made on behalf of the Municipality, and ratified by the Mayor. The justices under those circumstances, I think, had jurisdiction to entertain it. The other answer to the objection is the express words of the 264th section of *The Local Government Act*, which provides that a person authorised by the Mayor may represent the Municipality in all proceedings in a Court of Petty Sessions, or before a justice. A complaint is certainly a proceeding. That section was not, I think, repealed by implication by section 48 of *The Local Government Act*. On both grounds, I think that the matter was properly before the justices, and that the order was properly made. I think the rule must be discharged with costs.

HARDING and REAL, JJ., concurred.

Solicitor for appellant: *J. G. McGregor.*

Solicitors for respondent: *Unmack & Fox.*

RAVEN v. CLEVELAND DIVISIONAL BOARD.

Prohibition—Local Government—Recovery of rates—Disqualification of Justice by interest—Auditor—Ratepayer—Costs—51 Vic., No. 7, ss. 116, 119.

An auditor and a ratepayer of the Cleveland Divisional Board adjudicated on a complaint by the said Board for the recovery of rates against R.

Held, that both were disqualified by interest, and a writ of *prohibition* ordered to restrain proceedings on the judgment.

The appellant was deprived of all costs of evidence owing to the voluminous and irrelevant affidavits filed.

RULE *nisi* for a prohibition against the Cleveland Divisional Board restraining them from proceeding on an order for the payment of rates, made by the Small Debts Court at Cleveland on 22nd December, 1893, against Nicholas Walpole Raven, on the ground that the justices were interested parties at the time of adjudicating in the action. The chairman of the bench was Gilbert Burnett, an auditor of the Divisional Board, and the other justice was James Cross, a ratepayer.

Perske and *Fewings* moved the rule absolute, and submitted that Burnett, being at the time an auditor and paid officer of the Board, was disqualified, as also Cross. Burnett was elected by the ratepayers, but his remuneration was fixed from time to time by the Board. *The Divisional Boards Act of 1887*, ss. 116, 119.

Lilley, for the Board, submitted there was no reason why a ratepayer should not sit. *Jewell v. Young*, 2 V.B. (L.), 243. If it is a disqualification in large Boards, it would be necessary to send outside the district for justices. [HARDING, J.: *Ex parte O'Connor*, 8 S.C.R. (N.S.W.), L. 142, is just the reverse. In order to take away the common law disqualification there must be a statutory relief, as *The Justices of Peace Act, 1867* (30 & 31 Vic., c. 115, s. 2). Whenever a question of local government arose in this Court, any judge who was a ratepayer always retired until 54 Vic., No. 24, s. 24. GRIFFITH, C.J.: Necessity and acquiescence are the only exceptions to the recognised rule, but they do not abrogate it. *Paley's Summary Convictions*, 43; *re Gaisford* (1892), 1 Q.B., 381;

Mayor of Sydney v. Lord, 9 S.C.R. (L.), 95.]

The interest of the ratepayer was too small for a disqualification. *R. v. Farrant*, 20 Q.B., D. 58; *R. v. McKenzie* (1892), 2 Q.B., 519. The affidavits filed were unnecessarily voluminous, and contained serious charges against the justices. The costs of them should be disallowed.

GRIFFITH, C.J.: This was an action to recover rates due to the Cleveland Divisional Board. One of the justices who tried the case was an auditor of the Division, and the other was a ratepayer in the Division. The rule was granted for a common law prohibition on several grounds, some of which do not appear to be grounds for common law prohibition at all. The only ground that has been argued was that the justices were disqualified by reason of interest. There is no doubt that it is a general rule of law that no magistrate, however duly authorised in all other respects, can act judicially in any case in which he himself is a party. That rule has been held to apply to cases in which justices were pecuniarily interested, no matter to how small a degree, and also to any case in which a justice has such a substantial interest in the result as to make it likely that he has a real bias in the matter. In the present case the objection to one of the justices is that he was an auditor of the Division. It is true that auditors are elected by the ratepayers, and not appointed by the Board; but the Act provides that they shall receive such remuneration as the Board from time to time determine. I think that that relation can not be considered to leave an auditor free to adjudicate in matters relating to the affairs of the Division. With regard to the other justice, who was a ratepayer, it has been held in New South Wales and in England that a ratepayer has a pecuniary interest within the meaning of the rule, although it may be a very small one. It is quite clear that a ratepayer is interested in seeing that the funds of the corporation to which he contributes are kept up to a proper amount, so that he will not be called upon to pay a larger amount than he would have to pay if others paid their share. On that ground he

seems to be disqualified. It is true that there are statutory exceptions to the rule, but the Legislature has not provided a statutory relief from this disqualification. On this ground I think the rule ought to be made absolute with costs. With regard to the costs, it appears that there is a great deal of irrelevant or what has been called "impertinent" matter in the affidavits, and, to discourage that being done in the future, all the costs of the evidence on either side should be disallowed.

HARDING and REAL, JJ., concurred.

Solicitor for appellant: *S. S. Pegg*.

Solicitors for respondent: *Macdonald-Paterson & Hawthorne*.

CIVIL COURT.

HARDING, J. 19th, 20th February, 1894.

In the matter of The Real Property Acts, and in the matter of AN APPLICATION BY AMOS W. J. SKINNER.

Memorandum of transfer—Caveat—Registration—Will—Priority of gift—Real Property Act of 1861 (25 Vic., No. 14), ss. 43, 48, 99—Real Property Act of 1877 (41 Vic., No. 18), ss. 12, 32, 47–49.

S., being the registered proprietor of lands under *The Real Property Acts*, devised the said lands to the Queensland Trustees, Limited, upon certain trusts. Some time afterwards he executed a memorandum of transfer without consideration in favour of his son in the form required by the Act. That document remained in a drawer in the testator's house, and was not registered. The will was not revoked, and on the day of his death the transfer was lodged in the Real Property Office. Before the transfer was registered the Queensland Trustees, Limited, caused a caveat to be lodged forbidding the registration of the transfer. A summons to remove the caveat was dismissed on the ground that the will, being unrevoked, spoke from the death of the testator, and the gift not being registered was incomplete, and the Queensland Trustees, Limited, were held to be entitled to registration in priority to S.'s son.

SUMMONS by Amos W. J. Skinner, under s. 99 of *The Real Property Act of 1861*, calling upon the Queensland Trustees, Limited, trustees under

the will of Charles George Skinner, to shew cause why a caveat lodged by them with the Registrar of Titles on November 13, 1893, forbidding the registration of any instrument affecting that piece or parcel of land situated in the county of Stanley and parish of Bulimba, containing by admeasurement 2 roods 20 perches, more or less, being subdivision 1 of portion 7A, and being the whole of the land described in certificate of title No. 76,113, vol. 218. folio 103, should not be withdrawn, and that an order be made directing the Registrar of Titles to proceed with the registration of a certain memorandum of transfer of the land, bearing date March 16, 1892, and executed by Charles G. Skinner, now deceased, in favour of Amos W. J. Skinner, the present applicant. The facts of the case appear in the judgment.

Boone, for Amos W. J. Skinner, in support of the summons, submitted that under sec. 48 of *The Real Property Act* the right of the applicant was indefeasible, and that the Queensland Trustees had no *locus standi*.

Lilley, for the Queensland Trustees, Limited, shewed cause. The instrument was of no effect till registration—it merely gave a claim to registration which might have been defeated. The will of the testator spoke from death, but the deed of transfer only operated from registration. Both the will and the transfer were voluntary. The execution of the former was complete, but the transfer needed the assistance of the Court. [HARDING, J.: If the caveat had not been put on the register, there would have been no necessity to come to the Court. The question for decision is the priority of the claim. If there is authority for a voluntary conveyance being completed by will, I should like them to be referred to.] *Searle v. Law*, 15 Sim., 95; *Antrobus v. Smith*, 12 Ves., 39; *Edwards v. Jones*, 1 My. & Cr., 226; *Jefferys v. Jefferys*, Cr. & Ph., 138; *Tatham v. Vernon*, 29 Beav., 604; *Woodford v. Charnley*, 28 Beav., 96. [HARDING, J.: Did the will take effect on the land until it was presented for transmission and registration?]. Registration was unnecessary. The will spoke immediately on the death of the

testator. *Lambert v. Overton*, 13 W.R., 227; *Skillico v. Hobson*, 30 Ch.D., 396; sec. 32 of *The Real Property Amendment Act of 1877*.

Boone, in reply, cited *Ind. Coope & Co. v. Emerson*, 12 Ap. Ca., 300, and submitted the question for decision was whether the petitioner had the right to registration, and it was necessary to decide in whom the estate vested. It vested in Skinner the younger, and carried with it the right of registration without the aid of any other person. *Re Scanlan*, 3 Q.L.J., 43. The conveyance was complete the moment the memorandum of transfer was executed. The caveat ought to be removed.

HARDING, J.: I have been considerably embarrassed throughout the case by the intitulation of the papers, which is, "In the matter of the certificate of title No. 76,113, vol. 218, folio 103," and gives me no information whatever. It ought to have been intituled, "In the matter of caveat No. so-and-so, dealing with a piece of land shortly described, being the land more particularly described in the certificate of title," and the papers, whatever may be the result of the summons, will have to be amended in that direction. In this case Charles George Skinner, whom I shall call the elder, was at the time of his death the registered proprietor of the piece of land in question. Sometime before his death—namely, upon November 20, 1890—he made his will, and he thereby devised, in words sufficiently large, the land in question to the Queensland Trustees, Limited, upon certain trusts. On March 16, 1892, he executed a memorandum of transfer to his son, Amos W. J. Skinner, who is the applicant, in the form required by *The Real Property Acts of 1861 and 1877*. That document, as a fact, remained with others of a similar nature, in favour of other of his children, in a drawer in the testator's house. What was the intention as to what should be done with that document is disputed. It was to be registered after his death, if not before. But, in the view I take of it, it does not matter with what object it remained there. It remained there, and with the will being unre-

voked, and that transfer unregistered, the testator died on 3rd November last. During the course of that day his family lodged that transfer at the Real Property Office. On 13th November last, and before the transfer had been registered, the Queensland Trustees, Limited, lodged a caveat at the Real Property Office forbidding the registration of the transfer. Under those circumstances, Skinner the younger applies to the Court to order the caveat to be removed. *The Real Property Acts* of this colony, as has been often stated from this bench, provide a scheme for the registration of titles to land, and the land being on the register, instruments affecting it have no legal effect if not registered; or, in other words, the land does not pass under the instrument unless the instrument is registered, and has been admitted by the law to have become part of the register book of the Registrar of Titles of Queensland. Upon that event taking place, the interest carved out of the land by that instrument takes effect. There might be any number of instruments out at the same time, but the law has made provision for their priority according to their date of lodgment in general, and not according to the date of the deed. The law has made provision for persons having those instruments of title, or instruments purporting to be instruments of title, having the right or claim to have the matter investigated, and to have them registered or not according to their validity, and that claim exists notwithstanding that the documents have not been put upon the titles for a series of transactions, or even for a series of generations. An instrument might be executed by a registered proprietor to a man who might transfer to another man, who might again transfer, and so on, but the holder at the last has the right or claim to have the registration of the lot, or at any rate sufficient to give him a title. The risk he runs is that someone else might get priority in the interval, but there is nothing in the Act which calls upon the Registrar of Titles to register anything but a valid instrument. If an invalid instrument were tendered, such as a forged document, that is not an instrument such as should

be registered under the Act. At the same time, matters of life are such that even the Registrar of Titles and the Master of Titles are not infallible, and forged instruments of title, or an instrument which is a nullity, might by some accident get on to the register. If such a thing happened, the law prevailed, and the estate or interest passed, and whether any person who was deprived of the land by the action of the Registrar of Titles or his officer had a remedy or not depended upon certain sections of the Act, to which it is unnecessary for me to refer now; but such a remedy does exist in cases in which the law considers hardship has been inflicted, and for the purpose of indemnifying that person the law has provided an indemnity fund. Now, the question is, whether the document which has been tendered by Skinner the younger for registration was or was not a valid document, and in law effectual as a transfer. That depends upon the law entirely, outside *The Real Property Acts*, just the same as a forged instrument of transfer does not come under *The Real Property Act* in order to ascertain whether it was a forgery or not, but the law provides another means, and if it were forged, and the law proclaimed it to be forged, it should not be registered. If it was an ineffectual document, then *The Real Property Act* says there should be no registration of such document. In this case the instrument of transfer was admittedly made without consideration. It was what is called a gift. Now, a gift must be complete, and if it is complete it is valid between the parties to the gift—the donor and the donee. But so long as the gift is not complete nothing has gone from the donor to the donee. It still remains the donor's. In this case the donor executed a transfer of this property to his son, without consideration, and it was kept in his drawer. Until that instrument was registered by the Registrar of Titles nothing passed under it, and consequently the gift was incomplete. Therefore, the donor still had power over the property. Under those circumstances he died, and by his will he devised the land to the Queensland Trustees, Limited. That will, although dated before the transfer, by

The Succession Act of 1867, is deemed to speak not from the date but from the death of the testator. Therefore, that will was the last dealing which the testator had with respect to that property, in respect of which the inchoate gift existed. The land should therefore pass under that will and go to the Queensland Trustees, who should have the right to registration, and priority to Skinner the younger. That, however, can not be done in this proceeding, and a subsequent application, if the parties are so advised as to dispute the question, will have to be taken by the Queensland Trustees against Skinner the younger to have the document declared void; and unless the judge who deals with the case is overcome by the trouble that Dr. Boone will take to convince him that I am wrong, he will be outside *The Real Property Act* altogether, and the document declared to be void and useless. All I can do on this application is to say that the caveat ought not to be removed for the grounds given, and that the summons should be dismissed with costs.

Solicitors for applicant: *H. B. Lilley & Cowlishaw*.

Solicitor for caveator: *P. Paul*.

MARCH SITTINGS OF FULL COURT.

Re POWERS.

Admission of Barrister—Supreme Court Act of 1867 (31 Vic., No. 23), s. 40—Classics.

A solicitor who has been in actual practice for three years is entitled to be admitted as a barrister, on passing an examination in classics, under s. 40 of *The Supreme Court Act of 1867*.

Since 10th March, 1891, any such solicitor who has obtained the certificate of the Board of Examiners that he has passed the necessary examination in Latin and French, is entitled to admission as a barrister.

MOTION for the admission as a barrister of Charles Powers, a solicitor in actual practice of over three years' standing, under s. 40 of *The Supreme Court Act of 1867*.

Lilley, for the applicant, stated that the cer-

tificate of the Board stated that Mr. Powers had passed the examination in Latin and French, prescribed by the Board in rule 37 of *Regule Generales* of 7th September, 1880. Since 10th March, 1891, French had been made an alternative subject to Greek, and Greek was not now necessary in an examination for classics within s. 40 of 31 Vic., No. 23.

Gore Jones, and Groom, for the Board of Examiners, stated the certificate was given in that form to raise the question of the meaning of classics.

GRIFFITH, C.J.: This is a motion for the admission of Mr. Charles Powers as a barrister under section 40 of *The Supreme Court Act*, which provides that a solicitor who has been three years in practice, on passing an examination in classics, may be admitted by the Court as a barrister. The Board of Examiners, instead of certifying that he had passed the examination in classics prescribed, certified that he had passed the examination in Latin and French prescribed by the rules. Mr. Jones said that that was done on purpose to raise the question whether the examination, upon the passing of which an ordinary candidate for admission to the Bar might be admitted—that is, in Latin and French—was a sufficient examination in classics within the meaning of the statute. The statute evidently intended that the examination passed should be the examination in classics prescribed for the time being for persons seeking admission to the Bar. It appears that the present examination in classics prescribed is in Latin, and Greek or French. That is, in substance, an option to the candidate to take French instead of Greek. The legal effect seems to be either that the Board have dispensed with an examination in Greek altogether or have dispensed with it conditionally on the candidate passing in French. In either view it appears that the examination passed was that prescribed for persons seeking admission to the Bar. There is no doubt that Mr. Powers has been three years in actual practice, and I have no difficulty in making the order for his admission.

HARDING, J.: I am of the same opinion. I have no difficulty whatever about it. On hearing the certificate of the Board read, I am still of opinion that Mr. Powers is entitled to be admitted, and to be admitted as a barrister.

REAL, J.: I am of the same opinion, but I have had considerable difficulty in coming to it. We are empowered to make rules for the admission of barristers, and by virtue of the rules there would be no difficulty in the judges, if they thought it wise, enabling solicitors to come to the Bar by passing in living languages only without taking any ancient languages; but the Court has not thought it wise to do so, and consequently that is not one of the roads provided for admission to the Bar. The road provided is provided by the Legislature, and the Legislature has thought fit to say that the examination shall be in classics. That is the Act of Parliament, and whilst Parliament has intrusted the Court with power to make rules so as to provide means for ascertaining the qualifications of persons coming to the Bar, it did not enable the Court to make any rule which repeals its own Act, and if persons come to the Court not complying with the rules of the Court, but by virtue of the Act of Parliament, it becomes necessary to see if they have complied with the Act of Parliament. There are two meanings which can be given to *classics*, but looking at the time when the Act was passed, and to the rules then in existence, it must be taken to mean ancient classics, and I have not been able to lead myself to believe that French is ancient classics. Consequently, the only way is that suggested by the Chief Justice. If the term was confined to ancient classics, the difficulty became what was the classical examination presented for candidates for admission to the Bar. The classical examination presented *prima facie* was in Latin and Greek, but it was provided that certain candidates who had other qualifications would not be required to pass in Greek. I must confess that that is the only argument on which, I think, our judgment can be supported, when we have in point of fact fixed a standard that certain persons who have

shown that they possess some other knowledge, will only be required to pass in one branch of classics, which is in Latin. It certainly might be treated in that way when it was confined to Latin or Greek, and the candidate was a gentleman possessed of the knowledge necessary to be possessed by persons who desired to be excused from one branch of ancient classics, which was Greek. Taking that view, it is possible to admit Mr. Powers, but not on the ground that French is actually substituted for Greek, because if we could do that there would be nothing to prevent the Court passing a rule doing away with the necessity for Latin for admission to the Bar in the first instance and say, "You can take German" instead. That of course would mean that there would be no classics at all. Whether under those circumstances we could give that interpretation to the term *classics* under the Act is a very nice question. But seeing that the Court has chosen to say that candidates for admission to the Bar, who show themselves to be possessed of a certain knowledge of one of the living languages, will not be required to pass in more than one of the ancient languages, it is sufficient to entitle Mr. Powers to admission.

KELLY v. KELLY.

Deserted wife—Evidence—Maintenance—4 Vic., No. 5, ss. 1, 2.

By sec. 2 of 4 Vic., No. 5 before an order for maintenance can be made against a man for deserting his wife, it must be proved that the wife is without means of support.

A mere offer by the husband to resume cohabitation is not sufficient to prevent the order being made.

MOTION to quash an order on Patrick Kelly to pay maintenance for his wife Mary Kelly, on the grounds (1) that there was no evidence of continuing desertion, the said Patrick Kelly having, at the hearing of the summons on which the order was made, offered to provide a home for, and support the said Mary Kelly; (2) that there was

no evidence at the time the said order was made that the said Mary Kelly was without means of support; and (3) that the information or complaint upon which the said order was made was lodged too late.

The summons was issued on January 31st, 1894, complaining that Patrick Kelly had deserted his wife on 23rd September, 1891. She deposed that she was compelled to leave his residence owing to his continual drunkenness and immoral habits, and reasonable apprehension of danger to her person, and that she had been left without means of support. The magistrates made an order against the husband for the payment of fifteen shillings per week for the maintenance of his wife for twelve months. The husband offered to take his wife back, and stated his willingness to have her to live with him again. An order nisi to quash the order was granted on 16th February.

Macgregor, for the appellant, moved the order absolute, and cited *Mackenzie v. Mackenzie*, 3 V.L.R., 248; *Trengrove v. Trengrove*, 5 V.L.R. (L.), 27; *Jolly v. Jolly*, 5 V.L.R. (L.), 145; *R. v. Collins*, 7 V.L.R. (L.), 74; and *Reeves v. Yeates*, 31 L.J. (M.C.), 241.

Sydes, for respondent, submitted the question was whether the magistrates believed the husband's offer was *bona fide*. At the hearing, the wife stated her husband had left her without means of support, and that could be taken to include the fact that she was then without means of support. *Thomas v. Alsop*, L.R., 5 Q.B., 151.

GRIFFITH, C.J.: This is an appeal from a maintenance order made by justices. Three objections are made—that there was no evidence of continuing desertion, the husband at the hearing of the summons having offered to provide a home for his wife; that there was no evidence to show she was without means of support; and that the complaint was too late, that is to say more than six months after the matter of the complaint arose. I will deal with the second ground first, and on that point the only evidence was that she said that since September, 1891, her

husband had left her without means of support. Now, the first section of *The Deserted Wives and Children's Act* provides that the justices may, upon complaint that a married woman has been unlawfully deserted by her husband or left without means of support, summon the husband; and the second section provides that the justices shall inquire into the plaint, and if satisfied that the wife is in fact without means of support, and that the husband refuses to maintain her, they may make an order requiring him to pay for her maintenance such reasonable sum as they may think fit. That section appears to indicate, as pointed out in the Victorian cases, that one essential fact to be found by the justices is that the wife was in fact without means of support. In this case it is very likely that the wife was without means of support, but all the Court has to do is to deal with the evidence, and all the evidence was that since September, 1891, she had left him, and that she got nothing from him. There was nothing to show that she had not been earning her own living comfortably in some other way. On that ground the maintenance order cannot be supported, and it is not necessary to say anything about the others so far as this case is concerned. I should like, however, to say a word or two on the first ground, which assumes that an offer made by the husband, at the hearing of the summons, to take his wife back ought to be taken by the magistrates as a sufficient reason for not making an order. In support of that contention, two Victorian cases were relied upon, but upon examination it appears that the Victorian Act contained no section analogous to the 6th section of the amending Queensland Act. In this case the evidence showed that the wife was compelled to leave her home under reasonable apprehension of danger, and if the husband could by merely offering to resume cohabitation deprive her of her remedy, the benefit of the Act would be entirely taken away. There are no doubt cases in which the justices might be satisfied that the offer to take the wife back was *bona fide*, and if there were no reason why the wife should refuse to accept it, they might properly refuse to

make the order. It is, however, a mistake to suppose that the mere offer to take the wife back is sufficient to oust the jurisdiction of the justices to make an order. On the point of delay there seems to be something to be said on both sides, but in my opinion the rule must be made absolute on the second ground.

HARDING, J.: I think that the rule should be made absolute on the second ground, as I cannot find there was any evidence that she was without means of support. I do not think the third ground is tenable because the wrong was a continuing wrong, and the right accruing from it might only arise at a time subsequent to the desertion.

REAL, J.: I concur.

Solicitors for appellant: *O'Shea & O'Shea*.

Solicitors for respondent: *Powers & Robinson*.

YOUNG v. SMYTH.

Pacific Islander—Sugar cane—Field work—Driving along public road—44 Vic., No. 17, s. 7—47 Vic., No. 12, ss. 2, 10.

The carriage of sugarcane in a cart along a highway from the field where it was grown to a railway station is not field work within the meaning of *The Pacific Island Labourers Acts, 1880-1884*, and any person employing a Pacific Islander for that purpose is liable to be convicted under sec. 10 of the *Act of 1884*.

SPECIAL case stated by magistrates for the opinion of the Court. Young Brothers, of Fairymead, were summoned on 19th January, at Bundaberg, for having employed a Pacific Islander to drive a horse and dray from the canefield of a man named Nixon, along a Government road to the Childers Railway Station, in contravention of *The Pacific Island Labourers Acts, 1888 and 1892*. The defendants were convicted, and a nominal fine inflicted. The question for the Court was whether the conviction was rightly made.

Fees, for the appellants, submitted the question for the Court was the definition to be put on the term "field work." It must mean doing anything with the cane before it becomes a marketable product. It should not be confined to ploughing the ground and planting the cane. The mere fact

of having to go into a public road should not restrict the driving. The islander is allowed to go into the field, cut the cane, load it on the dray, and when it gets to the railway station he is allowed to handle it.

Byrnes, A. G., and Dickson for the Crown, contended that by the *Act of 1884* islanders were prohibited from doing the work of horse driving and carting, except in field work, and carting the cane along a public road was not field work. In many instances cane was taken in a punt to the mill, and it could not be contended that that was field work.

GRIFFITH, C.J.: This case raises a somewhat important question on the construction of *The Pacific Island Labourers Act*. The appellants were charged by the inspector at Bundaberg with a breach of the 10th section of the *Act of 1884*, which provides that from and after the 1st September, 1884, it shall not be lawful to employ islanders except in tropical or semi-tropical agriculture. Under the *Act of 1880*, the term tropical or semi-tropical agriculture was defined to mean the business of cultivating sugar, coffee, cotton, tea, and other tropical or semi-tropical fruits, and rendering the products thereof marketable. That Act contained no prohibition against employing the islanders otherwise than in tropical or semi-tropical agriculture. The term was only used in one other place in the Act, and that was in section 7, which prohibited licenses to be granted except to persons who were engaged in, or about to be engaged in, tropical or semi-tropical agriculture, and required a declaration to be made that they were intended to be employed in such agriculture only. There was nothing in the Act to compel the representation which had to be made before the license was granted to be carried out. A great number of islanders were introduced by persons engaged in tropical or semi-tropical agriculture, but they were nevertheless employed in all sorts of work which could not by any stretch of language be called tropical or semi-tropical agriculture, and certainly did not come within the extended definition given in the Act. Then the

Act of 1884 was passed, and it introduced a prohibition against the employment of islanders except in tropical or semi-tropical agriculture; and with it came a new definition of the term, which said that in the principal Act and in that Act the term was to mean field work in connection with the cultivation of sugarcane and certain other products, but was not to include certain things. I think that this second definition is exclusive, and was passed as a substitute for the former one, certainly for the purposes of the *Act of 1884*. I do not think that any part of the former definition can be read into the *Act of 1884* for the purpose of determining what tropical and semi-tropical agriculture means. The old definition was apparently thought not to be sufficiently definite. Islanders were employed in all sorts of occupations which could hardly be called tropical or semi-tropical agriculture in even the most extended signification of that term. In order to remove doubts, the section went on to say that certain things should not be included. Certainly amongst them were some which might be field work, and some as to which it would be very hard to see how they could possibly be called field work. In that respect the definition was not very artistic, but these were all points which had arisen at that time, and the work was work in which islanders had actually been employed. Probably the term "field work" would itself have been enough to exclude many of them, although it would not have excluded them all. For instance, engineers, engine-fitters, and engine-drivers, were often employed in field work in connection with the cultivation of sugarcane. Then blacksmiths, wheelwrights, sugar-boilers, carpenters, splitters, bullock-drivers, and mechanics might, it was conceivable, be said to be sometimes engaged in field work. The business of grooms and coachmen could hardly be called field work unless it was in driving the overseer in his buggy as he superintended operations in the field. Neither domestic nor household service could possibly be included. Another subsection referred to the business of horse-driving and carting except in field work. That subsection appeared to indicate

that the Legislature thought that field work might be contended to include horse-driving or carting in connection with the cultivation of sugarcane which was not necessarily field work. It recognised the fact that there was a great deal of horse-driving and carting about the cultivation of sugarcane, some of which was field work and some of which was not. It remained, therefore, lawful to employ islanders in horse-driving in field work, but not in horse-driving which was not field work. The natural meaning of the term field work was such work as was ordinarily done within the field in which the crop was grown. In the present case the carting was done under these circumstances. The appellants had bought a standing crop of cane, and the islander in question was employed to carry that cane from the field where it stood, and where it had been grown, to a railway station a mile off. He had to take it along the highway, and when the station was reached it had to be sent by train to the mills of the appellants, many miles away. It was admitted by Mr. Feez, as he was bound to admit, that the carrying of the cane by train was not field work, and that if it had been carried by a punt, as it might have been, and as was done in other parts of the same district, that would not have been field work. He was also constrained to admit that if it had been carried by a person under contract that would not have been field work. What difference could it make, then, that the islander was in the employment of the appellants? The test is the nature of the work, and not the terms of the employment of the person who does the work, or the particular vehicle in which it is carried along the highway. It seems to me that the decision was right, and that the carrying of cane along a highway from the field where it was grown to a railway station is not field work within the meaning of the section. Therefore the islander was improperly employed, and the conviction was properly made. It is not necessary to say that it would be a breach of the Act to cart sugarcane a short distance across a road from one field to another belonging to the same owner.

Probably such a case as that will never come before us. I think the decision should be affirmed, and I do not see why costs should not follow the event.

HARDING, J.: This is a special case stated by the magistrates for the opinion of the Court. The case, so far as it is necessary to state, was that an islander was employed in driving a horse and dray loaded with sugarcane from a field along a Government road, for a distance of about a mile, to the railway station, for the purpose of forwarding the cane to the mill of the employer of the Pacific Islanders. The cane had been purchased by the employer, the appellant, from Nixon as a standing crop, and was at the time being cut and removed for the purposes I have stated. The question is whether this islander was or was not engaged in field work within the meaning of *The Pacific Island Labourers Acts of 1880-1884*, the conviction being under the 10th section of the second of these Acts. The definition of the term tropical or semi-tropical agriculture is given in section 2 of the *Act of 1884*, and it depends upon the construction of that Act whether what he was doing was or was not work within the meaning of that section. Suppose that the cane was being carried. Now, the business of carrying goods from one point to the other is performed by a class of persons well known to the law as carriers. I should say that the test whether he was carrying, in the sense that a carrier conveyed goods from one place to another, would depend on whether or no they were going outside the place of business of the man for whom he was removing them. As long as he was dealing with them on his own premises he would not be in any way carrying or removing them, but the moment that he got out of his own boundaries he became a traveller—a carrier travelling along the public roads. Now, was this South Sea Islander with this load of goods a carrier at the time—was he travelling with these goods beyond the field or place of business of his employer? If he was, then he was engaged in something other than tropical or semi-tropical agriculture within the meaning of

the Act, because it did not mean carting other than in connection with the cultivation of the cane, except in the field work. So that I am of opinion that as soon as the cane passed the boundary of the planter's location it was then on a journey to some other place—to some place other than the plantation upon which it was grown. That being so, it was no longer subject to field work on that plantation. Consequently, I am of opinion that the conviction must be affirmed, and with costs.

REAL, J.: I concur in the judgment for the reasons given, and have nothing to add.

Solicitors for appellant: *Bernays & Osborne.*

Solicitor for respondent: *J. Howard Gill.*

THE QUEEN v. YALDWYN.

THE QUEEN v. CHANCELLOR AND OTHERS.

Licensing Act of 1895 (49 Vic., No. 18), ss. 6, 35
—*Packet License—Jurisdiction—Meaning*
of "*City of Brisbane*"—*Certiorari.*

A packet license was granted for the s.s. *Natone* to ply in the Brisbane River by Mr. Yaldwyn, P.M., and Mr. Chancellor, sitting as the licensing authority of South Brisbane, the license having been previously refused by the licensing authority of North Brisbane. Subsequently a transfer of the license was granted by certain of the licensing justices for South Brisbane.

Held by Griffith, C.J., and Harding, J. (Real, J., *dissentiente*), that the licensing justices of South Brisbane have no jurisdiction to grant packet licenses in respect of vessels plying within the port of Brisbane, for the words "the Police Magistrate, or any two licensing justices having jurisdiction within the city of Brisbane," in sec. 35 of *The Licensing Act*, since the erection of the Municipality of South Brisbane, apply to the Police Magistrate who ordinarily exercises jurisdiction in the city of Brisbane.

Held also that a rule *nisi* for a *certiorari* to bring up the certificate to be quashed should be made absolute.

RULE *nisi* for a *certiorari* calling on William Yaldwyn, P.M., and W. G. Chancellor, J.P., to show cause why the certificate granted by them to W. S. Kennedy, master of the steamer *Natone*, on 17th November, 1893, should not be brought up and quashed, on the ground that they had no jurisdiction to grant the certificate. A rule *nisi* for a *prohibition* was also asked against Messieurs

Yaldwyn, Chancellor, Allan, and Midson, restraining them from further proceeding on an order transferring the said license from Kennedy to Martin Matson, on 29th January, 1894.

The license had been previously refused by the licensing authority of North Brisbane. Mr. Yaldwyn dissented from the order for transfer.

Both rules were heard together.

Byrnes, A.G., and *Shand*, in support of the rules, submitted that the licensing authority of South Brisbane had no jurisdiction outside South Brisbane, and were not within sec. 35 of *The Licensing Act*. They had no jurisdiction within the city of Brisbane. Since that Act, the Municipality of South Brisbane had been created.

Perske shewed cause, and contended that at the time the Act was passed there was only one Police Magistrate in Brisbane, but now there were three, and any one of them was competent under the statute to grant a packet license.

W. A. D. Bell, for Mr. Yaldwyn, to submit: the order of the Court.

It was stated in answer to a question from the Bench that the Municipality of Brisbane was created under the provisions of *The New South Wales Act of 1858* by a proclamation of the Governor of that colony, bearing date 6th September, 1859, on a petition signed by over four hundred residents in the town of Brisbane.

REAL, J.: This is an application for a writ of *certiorari*. The facts have been admitted by both sides. Sec. 35 of *The Licensing Act* provides that packet licenses for the port of Brisbane shall be made to the Police Magistrate, or to two licensing justices having jurisdiction within the city of Brisbane. At the time that that Act was passed, it was admitted that there was only one licensing authority established for the whole of Brisbane. Subsequent to the passing of that Act, two licensing authorities were established, one retaining the name of the licensing authority for Brisbane, which was the licensing authority, not merely for Brisbane, but for a large number of divisions and boroughs, including the Pine River and various other places. The other includes what is

known as the borough of South Brisbane, and a large number of places which had never been included in the town of Brisbane. No difficulty could arise as to the granting of a packet license, for there was one licensing authority having jurisdiction within any part of that which was Brisbane until there was a division into the borough of South Brisbane and the municipality of North Brisbane. The licensing authority continued the same. The licensing authority for both North and South Brisbane was one and the same, as the licensing authority for Brisbane and the North Pine are now the same. Consequently there was between the two licensing justices one authority who had jurisdiction in any part of the city of Brisbane. For some time there was but one Police Magistrate who had jurisdiction within any part of the city of Brisbane. A change having taken place, and the Act of Parliament having used the words "city of Brisbane," it becomes necessary to see what interpretation ought to be given to "having jurisdiction within the city of Brisbane." Now, to my mind, there are two possible interpretations, and probably there is a third, but there are certainly two. One is that the word "within" was used, seeing that at the time there had been no division, and all the local affairs were under one government, with its Police Magistrate, in the sense of "throughout," so as to take in the whole of the city. If that were the true interpretation, then in this case the justices were not qualified, and there were no justices qualified, and no packet license could be granted unless it could be granted by the Police Magistrate by virtue of *The Justices Act*. That, however, is another question. By sec. 35 it is provided that packet licenses may be granted by "the Police Magistrate or any two justices having jurisdiction within the city of Brisbane." At the time that that Act was passed, Police Magistrates had a jurisdiction only within a certain area. Therefore at the time there was no doubt whatever that the Police Magistrate would be the Police Magistrate exercising jurisdiction in Brisbane, and no difficulty would arise whatever in the interpretation

of the word "within," because at that time there was only one Police Magistrate for the whole of Brisbane. There was nothing to have stopped that state of affairs continuing, notwithstanding the division of South Brisbane in 1888, if the Government had not chosen to divide what was then known as the licensing district of Brisbane. What was then known as the licensing district of Brisbane had never been described by any person with the slightest desire to be accurate. It was certain, however, that the licensing district for the city of Brisbane was the licensing district for a very large area—including some twenty boroughs and divisions. Before the proclamation in 1888 by the Governor-in-Council, constituting the borough of South Brisbane, the municipality of Brisbane was divided into seven wards, of which one was known as the South Ward, a division recognised by *The Local Government Act*. The original incorporated town of Brisbane was proclaimed at the request of some four hundred odd inhabitants. There was nothing to make any part of it the city of Brisbane to the exclusion of and other part. The town was divided into wards, but there was nothing to show which of them—the East, West, North, South, Valley, or Kangaroo Point Wards was the city of Brisbane. It was the town of Brisbane, and it continued the town of Brisbane though it had been described in various Acts of Parliament as the city of Brisbane and the municipality of Brisbane, and Parliament apparently recognised that that which had been incorporated as the municipality of Brisbane, and had been the town of Brisbane, had arrived at the dignity of a city, whatever that might be. In Victoria a town must have 20,000 inhabitants before the law recognised that it had reached the dignity of a city. The Executive Council thought proper to establish two licensing authorities—one as the licensing authority for Brisbane, and the other as the licensing authority of South Brisbane. The question arises did South Brisbane when it was erected into a borough cease to be a part of the city of Brisbane? I can see nothing to show that it did. It is clear to my mind that the

borough of South Brisbane is part of the place which Parliament has described as the city of Brisbane. There is nothing to take it out of that. The proclamation of the Governor-in-Council amended the division of the licensing district of Brisbane, and established the licensing district of South Brisbane. The latter exercises its jurisdiction at the Police Court in South Brisbane, which is also admitted to be within that part formerly known as the city of Brisbane. These facts being admitted, it becomes an important question, there being now no licensing authority which has jurisdiction for the whole of that which was the city of Brisbane—and as far as I can see there has been no proclamation notifying that it has ceased to be the city of Brisbane—whether there is exclusive authority in one part, and if so, how was it got? I have looked at the Act very closely, and it says “any two justices having jurisdiction within the city of Brisbane.” It seems to me that the interpretation of that which is the most reasonable, and which will lead to no absurdity, is that no licensing authority which does not exercise its jurisdiction within the area comprised in the city of Brisbane should have power to grant packet licenses. The result of that will be that there will be two concurrent jurisdictions. There is nothing to stop two concurrent jurisdictions, as has been laid down in the case of *R. v. Sainsbury*, 4 T.R., 456. I cannot see anything more reasonable than that the two divisions should exercise concurrent jurisdictions on both sides of the river. Of course they cannot fix different days for sitting in order to reverse each other's decisions or to exercise the same jurisdiction. That point arose in the case of *Candlish v. Simpson*, 1 B. & S., 357. The only inconvenience would be that there would be two parties with power to grant these licenses, and it is assumed that they would make different decisions; but the Government has the appointments of the licensing authority, and they can easily remedy it. On the other hand, it was contended that the erection of South Brisbane into a separate municipality cut it off from the city of Brisbane. The fact of its

incorporation did not make it cease to be part of the city of Brisbane. There is one other contention which might be argued—that is that it was the intention of the Act that the jurisdiction should be exercised by one body, and that is supported by the words “the Police Magistrate and two magistrates,” &c. No doubt there is something in the contention, but I see no reason why that should affect the words “city of Brisbane.” It may be that Parliament did not contemplate the Executive dividing it. It might have thought it advisable that the jurisdiction should be exercised by one body only, but the words of Parliament cannot be given effect to, and I cannot see how any effect could be given to the words “within the city of Brisbane” unless by one of the two constructions which I have pointed out. The ordinary and natural meaning is that any person appointed intrusted with the duties of licensing justice or as a Police Magistrate thought fit by the Governor-in-Council to exercise that function in the city of Brisbane is thought fit by Parliament to exercise the power of granting packet licenses. That seems to be the reasonable and natural construction. The other contention that it must be a power exercised for the whole of the city of Brisbane does not seem to me any more reasonable, while it is not strictly correct, grammatically speaking. For those reasons, although with some doubt as to which of those two constructions should be given to the Act, I think that it is clear in this case that the justices had the right to grant packet licenses, and consequently *certiorari* should not be granted. In taking that view I have the misfortune to differ from my brother Judges. It is a misfortune, but when I have once satisfied myself as to what I think the true and reasonable construction I never allow a consideration of that sort to interfere with me. I therefore think that the *certiorari* should be refused.

HARDING, J.: In order that a packet license should be granted, application has to be made under the 35th section of *The Licensing Act*, subsection 2. Such application can be granted by the Police Magistrate or any two licensing justices

having jurisdiction within the city of Brisbane. Section 6 defines who are to be licensing justices. It provides that the Governor-in-Council is to appoint justices of the peace as licensing justices for the district, and the Police Magistrate, if not appointed for any time or place in the district, should be appointed one of such justices; but he is not necessarily one of such justices unless he is appointed. For an application for a packet license a steamer has to be plying within the port of Brisbane, and the application has to be heard before the Police Magistrate or two licensing justices having jurisdiction within the city of Brisbane. On that the granting of the license has to take place—if within the jurisdiction, “within the city of Brisbane” by meets and bounds. On the facts stated with regard to the granting of the license neither Mr Yaldwyn nor Mr. Chancellor was at the date of its granting “the Police Magistrate of the city of Brisbane,” or the licensing justices under the Act “for the city of Brisbane.” If that stood alone the whole case was decided. They were not the persons who under the second subsection had “jurisdiction within the city of Brisbane.” They did not exercise their jurisdiction within the city of Brisbane, as I shall show immediately. The other four justices, Messrs Yaldwyn, Chancellor, Midson, and Allan, were not, on the day that they permitted the transfer, justices for the city of Brisbane, or for the licensing district of Brisbane. Now the further fact was that the borough of South Brisbane was included within the boundaries of the licensing district of South Brisbane; but the city of Brisbane was not included in the boundaries, and did not appear to be a part of the licensing district of South Brisbane. The original site of the town of Brisbane covered what is now the corporation of Brisbane on the north side of the river, and a patch on the south side, which by proclamation had become part of, and in fact contained the official residence of, the corporation of the municipality known as the Borough of South Brisbane. All this time the Borough of North Brisbane had existed. To go a little further, the

term “city” I do not think has ever been applied to any town that was not incorporated. A corporation has a Mayor and aldermen. The Council of the Municipality of Brisbane, which used to extend over the river of South Brisbane, has a Mayor and aldermen. The piece which has been cut off and called the Borough of South Brisbane has a Mayor and municipality. Now the Mayor and the municipality of Brisbane, by virtue of the cutting off, and the establishment of the other have no jurisdiction on the south side of the water, so that it seems beyond doubt that the corporation upon which the city of Brisbane now rests as a city is a corporation which is bounded by the river and does not go to the other side. If we go to the other side we find another Mayor and another corporation, and two corporations cannot go on within each other with equal powers. Therefore, that being so, what do we find in the case? We find persons in the borough of South Brisbane acting and purporting to exercise powers which only belongs to the city of Brisbane. Such exercise of power, to be of any value, must be exercised when they get within the city. It seems, therefore, that the rules *nisi* for *certiorari* in these two cases must be made absolute.

GRIFFITH, C.J.: The question raised on this application is whether the licensing justices for the licensing district of South Brisbane have jurisdiction to grant packet licenses in respect of vessels plying within the port of Brisbane. The question arises under the 35th section of *The Licensing Act*. As has been pointed by my brother Real, when that Act was passed no ambiguity or question of construction could arise because whatever Police Magistrates there were in Brisbane they had jurisdiction over the whole of the city of Brisbane, in whatever sense that term was used. But other things have since happened. What was then called the city of Brisbane, or rather the municipality of Brisbane, has been divided, five of the wards remaining under the old name, and the other ward—the South Ward—being joined to the division of Woolloongabba, and constituted a new borough

under the name of the Borough of South Brisbane. Another licensing district has also been established, including in its boundaries that part of Brisbane which comprised the South Ward, and the question now arises: to whom are applications to be made for packet licenses, and in what way under these altered circumstances is the section to be read? What is now the meaning of "the Police Magistrate or any two licensing justices having jurisdiction within the city of Brisbane"? My brother Real suggests that it must either mean "throughout the city" or "within any part of the city." I would suggest that there is a third reading—"within that part of the colony which is known from time to time as the city of Brisbane." I am disposed to think that that is the true view, and for these reasons. I think that the dominant idea of the Legislature as expressed in this section is not a question of boundaries, which the Legislature knew might be altered from time to time. I do not think that there is anything to indicate that in using the expression "the city of Brisbane" the Legislature were thinking of the area which was comprised within the then existing boundaries of the municipality of Brisbane. It seems to me that the dominant idea was to fix a certain place, and a definite authority, where and to whom applications could be made for these licenses. I do not mean a particular house, building, or street, but one fixed authority to whom application should be made. The inconvenience of having conflicting authorities was one of the arguments used in the *Candlish* case, and the possible scandal of a competition as to which should exercise jurisdiction was pointed out. That is one reason. Another which has pressed a good deal on my mind is what is the substance of the matter? What is the city of Brisbane in substance? It is a term which has been used in several Acts of Parliament. When the Corporation was incorporated it was incorporated under the name of the "Municipality of Brisbane." It was then a somewhat small town in the north of New South Wales. Soon afterwards the colony was separated from New South Wales, and Brisbane

became its capital, and became known as the city of Brisbane. I think that that name, after the separation of the South Ward, continued to be ordinarily applied to the preponderating area. It seems to me that what remained on this side of the river, including Kangaroo Point, has since been understood in the ordinary sense of the words to be the city of Brisbane. If that is so, then the licensing justices to whom applications should be made, are the justices of the district within which is comprised the area of the city of Brisbane. I think that was the intention of the Legislature when it used the words of the section. With regard to the term "the" Police Magistrate, I think the use of the definite article indicates that the Police Magistrate meant is the Police Magistrate who ordinarily exercises the jurisdiction of a Police Magistrate in the city of Brisbane. If the words "the Police Magistrate" were not limited in that way, I think that Mr. Yaldwyn would have jurisdiction, whether as a member of the licensing board or not, but it is not necessary to determine that point. He certainly is not the Police Magistrate ordinarily exercising jurisdiction in the city of Brisbane. I think the justices of South Brisbane have jurisdiction in South Brisbane exclusively. For the reasons I have given, I think that the justices had no jurisdiction to make the orders in question, and that the rules must be made absolute, and the certificates brought up and quashed.

APRIL SITTINGS OF THE FULL COURT.

REGINA v. BUNNEY.

Crown case reserved—Manslaughter—Contributory negligence.

Where the death of a person is caused by the culpable negligence of the prisoner, the fact that the deceased could have escaped by the exercise of reasonable care is no answer to a charge of manslaughter.

CROWN case reserved by His Honour the Chief Justice, under sec. 49 of *The Criminal Practice Act, 1865*.

The case stated that Frederick Bunney was tried at the Brisbane Criminal Sittings, held on the 12th March, on a charge of the manslaughter of John Plastow. The alleged unlawful act or omission causing death was culpable negligence in driving a spring cart along a public highway. It appeared from the evidence that Plastow, who was an aged and somewhat infirm man, and who habitually walked with the aid of a stick, was run over on a clear, starlight night in the middle of the road by a spring-cart which was being driven by the prisoner in the opposite direction to that in which Plastow was walking when last seen alive, a few minutes before the collision. There was sufficient evidence that Plastow's death resulted from culpable negligence on the part of the prisoner. For the defence it was suggested that the deceased was under the influence of liquor, and had by his own negligence contributed to the injury, which was the cause of death. Evidence tendered to establish this defence was objected to by the Crown Prosecutor, but admitted as being relevant to the question of the degree of the prisoner's negligence, the learned Judge stating that he would put a specific question to the jury as to the existence of contributory negligence, of which there was some slight evidence. Two questions were accordingly put to the jury:—1. Was Plastow's death caused by the culpable negligence of the prisoner? 2. Was there contributory negligence on Plastow's part? both of which questions they answered in the affirmative. It was contended by the prisoner's counsel that these findings amounted to a verdict of not guilty, but Griffith, C.J., directed the jury, following the cases of *R. v. Swindall*, 2 C. & K., 280; *R. v. Hutchinson*, 9 Cox, 555; *R. v. Jones*, 11 Cox, 544; and *R. v. Kew*, 12 Cox, 355, that upon the findings they should find the prisoner guilty, which they accordingly did. At the request of the prisoner's counsel he reserved for the opinion of the Supreme Court the question whether he ought to have directed the jury to find a verdict of not guilty. The question for the Court was whether he was right in directing the jury that on the

facts as found by them the prisoner was guilty of manslaughter, or whether he ought to have directed a verdict of not guilty. His Honour sentenced the prisoner to four months' imprisonment in Brisbane Gaol, but suspended the execution of the sentence under *The Offenders' Probation Act of 1886*, and prisoner had been discharged from custody upon recognisances under the provisions of that Act.

Sydes, for the prisoner, cited *Beven on Negligence*, 128; *R. v. Birchall*, 4 F. & F., 1087; *R. v. Hutchinson*, 9 Cox, 555; *R. v. Mastin*, 6 C & P., 396.

Power, for the Crown, was not called upon.

CHUBB, J.: In this case the prisoner was charged with the manslaughter of one Plastow, and the manslaughter was alleged and proved to have been caused by the culpable negligence of the prisoner. Two questions were put to the jury on the point raised by the prisoner's counsel as to whether contributory negligence would be a defence to a charge of manslaughter by negligence. The jury in answering the first question found that the deceased's death was caused by the culpable negligence of the prisoner. That would be sufficient, if it stood by itself, to support the case for the Crown. The second question asked was whether there was contributory negligence on Plastow's part. The difficulty which might perhaps have arisen on that question has been disposed of by the admission made by Mr. Sydes, that this question was to be understood to mean, and was so put to the jury—was it possible by the exercise of reasonable care for the deceased to have got out of the way? If the jury had answered the question in that form affirmatively it would not have been an answer. It would not be an answer in a civil case, and it certainly would not be an answer in a criminal case. A definition of contributory negligence will be found in *Smith on the Law of Negligence*, at page 227—"Contributory negligence in law is that sort of negligence which, being a cause of injury, is of such a character that the defendant could not avoid the effects of it" Then he goes on to say, "When

the plaintiff has proved, according to his evidence, that the act of the defendant has caused the injury of which he complains, the defendant in his turn may prove that the plaintiff, by his own act, contributed to cause the injury, and that the plaintiff might by the exercise of ordinary care have avoided the consequences of the defendant's negligence. But such proof is not of itself sufficient to destroy the plaintiff's claim, and the defendant must go further and show that the plaintiff's negligence was of such a character that the exercise of ordinary care upon the defendant's part would not have prevented the plaintiff's negligent act from causing the injury—that is the sort of negligence which the law calls 'contributory negligence.' Now, in the case stated by the learned Chief Justice, it was stated that there was sufficient evidence that Plastow's death resulted from culpable negligence on the part of the prisoner. His Honour further said there was some slight evidence as to the existence of contributory negligence. That must be understood to mean some slight evidence that possibly deceased might have got out of the way. As I have said before, that would not be an answer in a civil action, and it could not be taken to be an answer to an information for causing the death by negligence of a fellow-creature. It is possible, though I do not decide it now, that the defendant would have been entitled to acquittal if he could have shown that he could not have got out of the way by the exercise of reasonable care, but on the case as it stands I think the conviction was right, and that the judgment ought to be affirmed.

REAL, J.: I am of the same opinion. I think that although it may be that the contributory negligence which would free a man from civil liability would also free him from criminal liability, that would be merely a coincidence. It would not free a man from criminal liability simply because it freed him from civil liability. In all the criminal cases cited by Mr. Sydes, except one, the defence would not give protection in the Civil Court. In the present case it was manifest that it was the negligence of the prisoner that caused

the injury, not the subsequent act of negligence on the part of the deceased—as in the case of a man stopping in front of a runaway engine. The injury there would be due to the negligence of the deceased, because he would know that it was out of the power of the engine-driver to stop the engine, and still deliberately stopped in front of the engine. In that case the jury would answer "no" to the question, was the injury caused by the culpable negligence of the driver? The best test seems to be, was the injury or death caused by the culpable negligence of the prisoner. If it were, it seems to me that the liability would be there. It seems to me also, as has been pointed out by Mr. Justice Chubb, that, looking at the definition that has been given in civil cases, the circumstances of this particular case were such that there would be no relief from civil liability. All that was alleged in this case was that the deceased, had he been vigilant or had he been watchful, would have been able to see something which would have enabled him to get out of the way; but, as I understood counsel, it was proved, and it was relied on, to show that deceased was negligent, that he was in the habit of walking looking down, and it was also alleged that he was in a state which would preclude him from exercising that observation. That being so, it is perfectly clear that the second part of the definition with regard to civil liability would not have been applied to that. It might be that he was guilty of negligence in placing himself in that state, but that was not an act of negligence causing death or injury whatsoever had prisoner taken ordinary care. So that even if the definition of negligence which would involve criminal liability is to be taken to be precisely the same as that which involves civil liability, there would still be no relief of liability in this case, and the conviction would have to be affirmed. Of course I do not say whether it is or is not the same. It seems to me that if it is the same it is only a coincidence, and criminal liability is not to be measured by the civil liability, although it might possibly be that the two ran precisely in the same lines on some occasions.

GRIFFITH, C.J.: I am of the same opinion. An attempt was made at the trial to set up that the rules relating to civil actions for negligence applied to a prosecution for manslaughter. In deciding, as I did, I followed the authorities, which, with one exception, and that only the *dictum* of a very learned Judge, were all to the contrary. I am of opinion that the principles which would excuse the defendant in an action for negligence are not the principles which should apply in considering whether the prisoner was guilty of manslaughter. I entirely agree with Mr. Justice Real, that, though it might sometimes happen that a man would be free from both criminal and civil liability, it by no means follows that he would be free from criminal liability because he was free from civil responsibility. I am of opinion that the question of contributory negligence was entirely irrelevant, and that the real question to be tried by the jury was—was the death caused by the culpable negligence of the prisoner? In considering that, I thought that the evidence relied upon as showing contributory negligence was admissible, though irrelevant as raising a substantive defence in respect of negligence. I think that that is perhaps not the best term to be used, but I used it as the term employed in the cases cited. I think a better word might be used, if it were necessary to leave the question to the jury, but apparently it was not necessary to do so. The conviction will be affirmed.

Solicitor: J. B. Price.

CIVIL COURT.

HARDING, J.: 18th April, 1894.

BRITISH AND AUSTRALASIAN TRUST AND LOAN
CO. v. SOUTH QUEENSLAND PASTORATE CO.

*Mortgage—Default—Foreclosure—Real Property
Act—Registration.*

On a motion for judgment for foreclosure in default of the payment of money secured by a mortgage of lands under *The Real Property Act*, a declaration will not be made that, in case of default in payment within

a certain time of the amount certified by the Registrar, the plaintiff is entitled to be registered as proprietor of the mortgaged lands.

MOTION for judgment by default under O. XXIX, r. 10, no statement of defence having been delivered. The plaintiff company was mortgagee of certain lands under *The Real Property Act*. The defendant had made default in payment of the principal and interest due, and the plaintiff issued a writ for foreclosure.

The plaintiff, in the statement of claim, asked for an account, and on default in payment within one month from the date of the Registrar's certificate for an order for foreclosure, and for a declaration that in case of default the plaintiff was entitled to be registered as proprietor of an estate in fee simple in the said lands.

Scott, for defendant, did not oppose the application, but stated that it had been admitted between the parties that the defendant company was being wound up voluntarily in England, and submitted one month was too short for payment, and asked for the period to be made six months at least.

Shand, for the plaintiff, in support of the motion submitted that payment should be ordered within one month from the Registrar's certificate.

HARDING, J.: The order will be judgment for the plaintiff for an account, payment within six months from the Registrar's certificate; in default, foreclosure according to paragraphs 1 and 2 of the prayer of the claim, but I will not declare that in case of default the plaintiff is entitled to be registered as proprietor of the lands. By our *Real Property Act* provision is made for the appointment of a Registrar of Titles and a Master of Titles, and the Registrar of Titles is the person to deal with questions of registration. If he will not decide the matter, or decides it wrongly, then the Court can be appealed to. That matter is not before me at present.

Solicitors for plaintiff: *Rüthning & Jensen.*

Solicitors for defendant: *Hart, Flower & Drury.*

GRIFFITH, C.J. : 16th, 17th May, 1894.

STANLEY v. WISEMAN.

Mortgage—Transfer—Real Property Act of 1861
(25 Vic., No. 14), s. 68—*Covenant—Indemnity—Form of judgment.*

The purchaser of land, subject to a bill of mortgage, registered under *The Real Property Act*, is by s. 68 of *The Real Property Act of 1861* under an implied covenant to indemnify the mortgagor against claims for interest by the mortgagee, and a declaration for indemnity, and an order for payment of the amounts claimed will be made against the transferee, although no money has been paid by the mortgagor, or by another person jointly and severally liable under the mortgage.

Form of judgment in such case.

ACTION for damages for breach of covenant to pay interest, and to indemnify the plaintiff against the payment of interest.

The plaintiff and his brother, F. D. G. Stanley, being registered under *The Real Property Acts* as proprietors of an estate in fee simple as tenants in common free from encumbrance in certain pieces of land in Adelaide Street, Brisbane, mortgaged the lands to the Queensland Investment and Land Mortgage Company for £14,800 for five years at ten per cent per annum, interest payable quarterly with joint and several covenants. The plaintiff sold his equity of redemption in the lands mortgaged to the defendant, Solomon Wiseman, for £2,500, executed a memorandum of transfer in his favour, and the transfer was registered. The defendant and F. D. G. Stanley thus became tenants in common in the lands subject to the mortgage. The plaintiff and F. D. G. Stanley having made default in payment of the interest due, the Queensland I. and L. M. Co. sued and obtained judgment against the plaintiff and F. D. G. Stanley for £1,526 1s. 10d. and costs to be taxed. Further defaults were made in payment of the interest amounting to £740. The said F. D. G. Stanley did not pay the interest due; and the plaintiff requested the defendant to pay the said sums of money, and to indemnify and hold him harmless from the payment thereof, but the defendant refused and neglected so to do.

The plaintiff claimed (1) (a) £2,500 damages for

breach of covenant; (b) In the alternative a declaration that the defendant is liable to pay to the plaintiff all demands which have been made upon him in respect of interest, costs, and expenses under the mortgage, and in every respect of the said action which have not been paid by the plaintiff, the plaintiff undertaking to pay to the said company so much as is due to it. (2) A declaration that the defendant is liable to indemnify the plaintiff against all demands for principal and interest, and against all liability under the said mortgage. (3) That an account may be taken of what, having regard to such declarations as the Court may make, is due to the plaintiff, and that the defendant may be ordered to pay the same to the plaintiff. (4) That the defendant may be ordered to give a good and effectual indemnity to the plaintiff in respect of the said mortgage to indemnify the plaintiff from and against all demands which may hereafter be made on the plaintiff, or which he shall incur or sustain in respect of the said mortgage.

The defendant traversed the allegations in the statement of claim, and pleaded that the memorandum of transfer was executed and registered without his authority, knowledge, or consent.

Lilley and Scott for the plaintiff. *Byrnes, A.G.* and *Shand* for defendant.

Lilley, in opening, referred to sec. 68 of *The Real Property Act of 1861*.

GRIFFITH, C.J., pointed out that whatever might be the findings of the jury, as the register was not impugned, the plaintiff would be entitled to judgment. The defendant was the registered proprietor, and registration made the covenant. There was no counter claim.

Byrnes, A.G. : The register is only *prima facie* evidence. [GRIFFITH, C.J. : That is not my view.] We can shew equities. Our contention is that we are on the register by mistake. I will ask for leave to amend by adding a counter claim for rectification of the register on the ground of mistake, and to have the transfer taken off the register; in the alternative that the transfer was by way of security only.

Lilley objected, and contended that an action might lie against the person registering the transfer, not against the plaintiff.

The amendment was allowed.

The defendant's counsel afterwards admitted for the purposes of the action that the defendant was *de facto* registered under *The Real Property Acts* as transferee of the land in question.

Lilley moved for judgment for the relief claimed, and cited *Seton on Decrees*, 4th Edit, 1378; 5th Edit, 1964; *Lloyd v. Dimmack*, 7 Ch.D., 398; *Hughes-Hallett v. Indian Mammoth Co.*, 22 Ch.D., 561; *Hobbs v. Waget*, 36 Ch.D., 256; *Bridgman v. Daw*, 40 W.R., 253; *Lindley's Partnership*, 5th Edit., 374. The plaintiff will undertake that the money will be paid to the mortgagees, and asks for leave to apply.

Byrnes, A.G.: The only judgment that can be given is the second part of the prayer. The order in *Lloyd v. Dimmack* differs from the judgment. There should not be a hard and fast order to pay the amounts mentioned. F. D. G Stanley might pay.

GRIFFITH, C.J.: Since *Wolmershausen v. Gullick* (1893), 2 Ch., 514, there is no doubt an order can be made before any payment has taken place. The only question is as to the form of relief. I could order the money to be paid into Court. I cannot make an order to the prejudice of the mortgagees in their absence.

C.A.V.

GRIFFITH, C.J., delivered judgment. The facts being no longer in dispute, the only question is as to the form of relief to which the plaintiff is entitled. The covenant implied by virtue of sec. 68 of *The Real Property Act of 1861* on the part of the defendant as transferee of the equity of redemption of the land is that he will pay the interest secured by the bill of mortgage after the rate, and at the times therein mentioned, and will indemnify and keep harmless the plaintiff as transferor from and against the principal sum secured by the bill of mortgage, and from and against all liability in respect of any of the covenants therein contained, or by the Act

declared to be implied on the part of the transferor. The damages recoverable at common law for breach of a covenant in these terms would be the full amount of the instalment of interest or principal not paid at the date mentioned in the bill of mortgage (*Penny v. Fox*, 8 B. and C., 14; *Loosemore v. Radford*, 9 M. and W., 657), just as in actions for detinue of title deeds the damages are the full value of the estate, which, however, are reduced to a nominal amount on return of the deeds. It is manifest, however, that all the plaintiff is really entitled to is an indemnity. And the defendant is entitled to have any amount paid by him applied in discharge of the plaintiff's liability to the mortgagees, and so in discharge *pro tanto* of the burden on the land which the defendant has bought. It appears that in some cases of actions for an indemnity the Court has contented itself with making a declaration of the plaintiff's rights. In other cases orders have been made for payment by the defendant to the plaintiff of the amount in respect of which the indemnity is claimed, with or without an undertaking by the plaintiff to apply it in payment to the creditor. All the cases on the subject are reviewed by Wright, J., in *Wolmershausen v. Gullick* (1893), 2 Ch., 514. I have not, however, been able to find any case exactly analogous to the present, or any in which the defendant's right to, and need of, protection was distinctly submitted to the consideration of the Court and insisted on, as in this case. I think that a judgment merely declaring the plaintiff's rights would in many cases be incomplete. I think also that, in a case where, like the present, the debt is charged on land belonging to the defendant, an order for payment to the plaintiff *simpliciter* would be inadequate to protect the defendant. Both parties insist that the judgment of the Court shall give them all to which they are entitled. I think that I can pronounce such a judgment by following the analogy of the common law practice in actions for detinue of title deeds. The whole question of the defendant's liability to indemnify the plaintiff having been raised, I see no difficulty in dealing

in this action with the plaintiff's right to indemnity in respect of future payments as well as those now due. But I think the best way of dealing with that part of the case will be by reserving further consideration of the action. The parties have agreed to fix thirty days as the time to be limited in the judgment during which the defendant may discharge the plaintiff's debt to the mortgagees. The judgment of the Court is:—1. Declare that the plaintiff is entitled to be indemnified by the defendant against any liability which the plaintiff has already incurred or may hereafter incur in respect of the covenants contained in the bills of mortgage in the pleadings mentioned. 2. Order that the defendant do pay to the plaintiff the amounts of the instalments of interest accrued due by the plaintiff under the covenants before judgment, namely, £1620 5s. 10d. and £740, and interest, if any, due thereon, the plaintiff undertaking to apply the same forthwith in payment to the mortgagees in the pleadings mentioned. But the execution of this part of the judgment is to be suspended for thirty days, and if within that time the defendant produces to the plaintiff or his solicitors a receipt in full or other sufficient discharge from the mortgagees for such instalments and interest, if any, due thereon all proceedings upon this part of the judgment are to be stayed. 3. Defendant to pay the costs of the action. 4. Reserve further consideration. Liberty to apply.

Solicitors for plaintiff: *Macpherson & Peck.*

Solicitor for defendant: *J. F. Fitzgerald.*

HOLLAND v. HARTFORD.

Cemetery Act, 1865 (29 Vic., No. 15), s. 36—Disturbance—Costs.

A conviction against a person for creating a disturbance during a funeral service was quashed, as the information did not state that the disturbance was wilfully committed.

Costs were given against a trustee of the cemetery who laid the information, as he failed to prevent the proceedings on appeal, although he knew they were improperly instituted.

MOTION to quash a conviction against W. H. Hartford in the Police Court at Mitchell, under sec. 36 of *The Cemetery Act, 1865*, on a charge of "creating a disturbance by fighting during a funeral service was being conducted," on the ground that the words "wilfully and unlawfully" were not used in the charge.

The information was laid by Mr. Holland as secretary to the trustees of the Mitchell Cemetery, and heard before the local bench of magistrates. They found Hartford guilty, and imposed a fine of £5 upon him, with the option of one month's imprisonment. The evidence given at the hearing was conflicting as to the exact period of the funeral proceedings at which the disturbance occurred, and as to how it originated. It appeared, however, that the coffin of the deceased had been lowered into the grave, and Hartford was engaged in filling in the earth. Carrying out the order of his superior, Hartford went to an adjoining grave and took away some of the loose earth to finish off the grave he was attending to. Some words then passed between him and another gravedigger, some strong language being used, and some blows struck. In the course of the evidence it was stated that part of the disturbance took place while Hartford was standing in the grave, but that was denied by other witnesses.

Lukin moved the order absolute, and submitted the omission of the words was fatal. *Carpenter v. Mason*, 12 A. & Ell., 629; *R. v. Bent*, 1 Den., C.C., 157. Costs were asked against the complainant, on the ground that it was pointed out to him that the proceedings were improperly instituted, and he took no steps to prevent the cost of appealing to the Full Court.

GRIFFITH, C.J.: The Court is of opinion that the omission of the word wilful is fatal to the conviction. I am reluctant to give costs against a trustee discharging what he considered a public duty. If that were done people would hesitate to take such positions. But my brothers think that the rule should be made absolute with costs, and I do not dissent from them.

HARDING, J., concurred.

REAL, J.: I am of the same opinion under the circumstances of the case. An effort to stop costs should have been made in the earlier proceedings. If the respondent had consented to the order even with costs, probably we should not have been entitled to give costs against him, but I think there should be some means of preventing the cost of litigation keeping up. The respondent having done nothing, it is only natural that he should pay the costs.

GRIFFITH, C.J.: Those are the circumstances which induce me to concur in the costs being given against him.

Solicitors: *Morris & Heiner*.

MAY SITTINGS OF THE FULL COURT.

Re A. S. LILLEY, A SOLICITOR.

Solicitor—Actual practice—Supreme Court Act of 1867 (31 Vic., No. 23), s. 40.

Three years' actual practice is a condition precedent to the right of a solicitor to be examined under sec. 40 of *The Supreme Court Act of 1867*.

A solicitor who acts as managing clerk for another solicitor is not in actual practice.

APPLICATION for an order on the Board of Examiners for barristers to examine Arthur S. Lilley, solicitor, under sec. 40 of *The Supreme Court Act of 1867*.

The Board had stated that they required proof that the applicant had been in actual practice for three years.

REAL, J., held that three years' actual practice was a condition precedent to the right of examination, and that the Board were entitled to be satisfied as to the period, but intimated that if the Board refused to examine the applicant after such proof, and a question should arise as to what constituted actual practice, he would refer the matter to the Full Court.

It appeared from affidavits that the applicant had been practising on his own account, and had also acted as managing clerk to Messieurs Lilley and O'Sullivan since his admission.

The question was referred to the Full Court.

Lilley and Macgregor for the applicant. *Gore Jones* for the Board.

GRIFFITH, C.J.: The 40th section of *The Supreme Court Act of 1867* provides that, "Any attorney, solicitor, or proctor of good repute in his profession having been three years in actual practice in Great Britain or the colony, who shall pass the examination in classics or mathematics prescribed for persons seeking admission to the Bar, or who shall have a certificate of honour, or other academical distinction in classics, mathematics or law, from any university or college within the British Dominions, may upon motion in open Court be called and admitted a barrister-at-law." This application was made on behalf of Mr. A. S. Lilley, who was admitted on 6th May, 1890, and since that time up to the 24th April has been practising on his own account as a solicitor for a period of two years and sixteen days. He had also been engaged as managing clerk for a firm of practising solicitors for a further period of one year and eighty-six days, and it was claimed that he was entitled to add that period to the period of two years and sixteen days, so as to make up the period of three years during which he had been in actual practice. The Board of Examiners doubted whether employment as a managing clerk meant actual practice within the meaning of the Act. Mr. Gore Jones, who appeared for the Board, said that they could not see any practical difference between the position of a solicitor employed as a managing clerk before he was admitted, and his position as a managing clerk after he was admitted. Now, the term practising solicitor is a well-known term. It is used in England with reference to annual certificates which have to be taken out every year on payment of a fee before a solicitor is allowed to practise—to carry on his business. The term is also used, and has been used for a very long time, with reference to solicitors to whom clerks are articulated for the purpose of themselves being admitted as solicitors. In both these connections the term is used in the sense of attorneys, or as solicitors, as they are now more commonly called,

who are carrying on business as masters on their own account. Only such solicitors can have clerks articulated to them with any effect, and only such solicitors are required to take out annual certificates in Great Britain. The section was first passed in 1861, at which time I think the meaning of the term practising solicitor was well known. The words used in the Act are "in actual practice." That in my opinion does not mean merely nominal, not real practice, such as that of a man who merely has his name on a door, and is not there, and is not carrying on business. That would not be "actual practice." Such was the case which occurred in this Court some years ago, where a gentleman who lived and carried on business himself in Toowoomba had an agency, or what was called an agency in Brisbane, which was managed by a gentleman under articles to him. In that case the Court held that the managing clerk had not served under articles to a solicitor practising in Brisbane, and refused to admit him. The words might be taken as intended to emphasize the necessity for the actual carrying on of the business or profession of a solicitor as distinguished from merely having a name on a door or the nominal carrying on of business. I am of opinion that the term should be construed in that sense, and understood in the ordinary sense of practising as a solicitor—carrying on the profession of a solicitor as a master on his own account. In the present case, Mr. Lilley has not been carrying on business in that sense for three years before presenting this petition, and on that ground it appears to me that the decision of the Board in refusing to examine him is right. In the course of the argument it was said that it is the practice of clerks who are solicitors to act as solicitors ostensibly on their own account, and in particular to sign documents taken to the Real Property Office for registration on behalf of the solicitor on whose behalf they act. If that is so, the practice entails some danger. A gentleman admitted as a solicitor, but who is a clerk to another solicitor, can only sign as solicitor for a client by the express authority of the client. If a

client employs a solicitor for himself, he does not give an implied authority to another person employed by the solicitor to sign as his solicitor on his behalf, and any managing clerk who does that incurs very serious risk. If there is any such practice it would be well for the profession to consider the matter. For the reasons I have given, I think the petition must fail, and that no order should be made upon it.

HARDING and REAL, JJ., concurred.

At the next Full Court an appeal was heard from the decision of Real, J., as to the right to be examined, although the applicant had not been in actual practice three years.

HARDING, J.: The use of the words "shall pass" in the section points to a future act after the applicant has been three years in actual practice. As to the provision with regard to having a certificate, it applies to a person who, after the expiration of three years, has such a certificate of academical distinction. I have struggled much to read this case through the statute, because I think the tendency of the present day is very much to ease down difficulties. That seems to be the meaning of present Acts of Parliament. In fact, we had an example the other day of an attempt before the Legislature to simply make election to Parliament a qualification for practising at the Bar before the Court. Therefore I take it that legislation should be so construed as intended to lower the status of knowledge, but even to carry out what seems to be the intention of the Legislature in view of the language they have used, I find I cannot do so, and I am driven to hold that this appeal must be refused.

COOPER and CHUBB, JJ., concurred.

THE QUEEN v. ELECTORAL JUSTICES OF TOOMBUL.
Mandamus—Elections Act of 1885 (49 Vic. No. 13), ss. 6, 28, 31, 33—Elections Act of 1892 (56 Vic. No. 7), s. 3—Form of claim—Sufficiency of description of place of abode—Costs against Crown.

In a form of claim to be registered as an elector, the place of abode, required to be specified by sec. 3 of The

Elections Act of 1892, was described as "Oriol Road, Hendra." At the Quarterly Registration Court the claimant did not appear, and a letter posted to the claimant by the Electoral Registrar to that address was delivered there on the day after posting. Some of the justices also had local knowledge of the district. There were only two houses in that road. The Court rejected the claim on the ground that the description of the abode did not enable it to be clearly and easily identified.

Held, by Harding and Real, JJ. (Griffith, C.J., *dissenting*), that the description was sufficient, and a writ of *mandamus* was granted to place the claimant's name on the roll. Costs were given against the justices, as the Crown solicitor had instructed counsel to appear on their behalf to shew cause.

RULE *nisi* for a *mandamus* calling upon G. P. M. Murray, P.M., and S. Unwin and George Robert, J.J.P., to show cause why the name of Robert Messenger should not be placed on the electoral roll for the electoral district of Toombul.

At the quarterly meeting of the Electoral Registration Court, held on 3rd April, for that district, Messenger's claim to be registered was rejected, on the ground that the description he gave of his place of abode was not such as to enable him to be easily and clearly identified. Messenger described himself as a jockey living in Oriol Road, Hendra.

The grounds on which the rule was asked for were:—That the particulars of the qualifications mentioned in the claim were sufficiently described; that the justices did not adjudicate on the claim of Messenger; that no notice was sent by the Electoral Registrar requiring him to attend to prove his qualifications; that the Electoral Registrar did not make full and careful inquiries as to his qualifications.

Sydes, for the applicant, moved the rule absolute, and stated that there were only two houses in what was called Oriol Road, Hendra. Messenger did not appear at the Electoral Court, and he had no opportunity of making good his qualifications. The Electoral Registrar stated that he had no reason to doubt that the applicant had the necessary qualification, but the Electoral Court rejected the claim.

REAL, J.: If that is the law, it seems to me that it is specially designed to disfranchise people.

GRIFFITH, C.J.: I should like to hear argument before expressing so strong an opinion as that.

REAL, J.: I have no hesitation in expressing the opinion if that is the law. If that is the law I can see no other object, but I should be loth to believe that it is the law before seeing the sections.

Fecz, for the respondents, read the affidavit of Mr. Murray, giving the circumstances under which the claim was rejected. The claim was rejected because it did not give such a description of the applicant's place of abode to enable it to be "easily and clearly identified." The Electoral Registrar's duty was to inquire whether the applicant had the proper qualifications, not to inquire whether he had made out a proper claim to be registered in respect of his qualifications. [GRIFFITH, C.J.: The first point seems to me to be whether the magistrates can apply their local knowledge.] It is submitted that the magistrates could, and in exercising it they determined that the description given was not sufficient to enable the place of abode to be easily and clearly identified. Sections 28 and 33 of *The Elections Act of 1885*, and section 4 of *The Elections Act of 1892* were cited, and *re Bulcock*, 1 Q.L.J., p. 97, and *Barlow v. Mumford*, L.R., 2 C.P., p. 81. The words are stronger than the provisions affecting residence under *The Bills of Sale Act*. [REAL, J.: The only object of the section seems to be to find the man.] The question of the sufficiency of residence is one of fact, and the Court would not interfere with decisions of the justices.

REAL, J., referred to *Briggs v. Boss*, L.R., 8 Q.B., 268.

Sydes, in reply, submitted that the object of the Act was to confer the franchise upon certain people in the colony of Queensland, but the respondent's contention was that its object was rather to have a form filled in than to give a man the franchise. [GRIFFITH, C.J.: I take it that the object is to secure that every man entitled to the franchise shall get it, and no man not entitled shall get it without opportunity being given to other people to object.] The claim was regular

on the face of it, and it was the duty of the magistrates to allow it, and have it posted up for three months, so that inquiries might be made by the registrar perhaps or by persons who felt inclined to object. The claim was *prima facie* correct, and the Bench were in duty bound to pass it. *Queen v. Monmouth*, 5 L.R., Q.B., p. 251.

HARDING, J.: The Chief Justice has asked me to deliver judgment, and I will proceed to do so, but it will not be the unanimous judgment of the Court. It will be my own judgment in the case. This is a rule granted by me on the 18th April on the application of Mr. Sydes, on behalf of one Robert Messenger, calling upon Mr. Murray, P.M., and two other magistrates named Robert and Unwin, resident in the electoral district of Toombul, to show cause why a writ of *mandamus* should not issue commanding them as such justices to cause the name of Messenger to be placed on the electoral roll for the electoral district of Toombul. In the alternative they were also called on to show cause why a writ of *mandamus* should not issue commanding them to hear and determine an application by Messenger to have his name inserted in the electoral list of the electoral district of Toombul, as a person qualified to vote for the election of a member to be returned to the Legislative Assembly. The rule was granted on the grounds that the particulars of the qualifications mentioned in the claim were sufficiently described; that the magistrates did not adjudicate on the claim of Messenger; that no notice was sent by the Electoral Registrar requiring him to attend to prove his qualifications; that the Electoral Registrar did not make full and careful enquiries as to his qualifications. I thought at the time that there was a *prima facie* case for granting the rule *nisi*, there being a question of considerable difficulty to be argued afterwards. Now, I have to consider whether the rule so granted should be made absolute. Taking the four grounds, I will take the first two as one, and the other two as the second ground. I will deal more particularly with the first. *The Elections Act of 1885*, sec. 6, defines certain qualifica-

tions, which I need not enumerate, as the qualifications of a person entitled to be entered on the electoral roll of any district. Then there is a part which relates to the preparation of the electoral rolls, and for that preparation a Registration Court is constituted, and it is in respect of such a Registration Court that this rule has been granted. How these rolls are to be made up is contained in sections 28 and 33. Then comes section 31, which provides that it is for the clerk to produce the claims for registration at the Revision Court, and a declaration containing the claim is to be taken as *prima facie* evidence of the claim. If the claim is rejected by the Court, the chairman has to endorse on it the cause of the rejection, and the Electoral Registrar has to forthwith transmit by post or otherwise a notice of the rejection and the cause thereof, to the claimant. Now as to this particular claim, it comes under section 3 of *The Elections Act of 1892*. That section provides that "a person claiming to have his name inserted in any electoral roll may deliver his claim or send it by post to the proper Electoral Registrar for the district in the roll for which he claims to have his name inserted. The claim must be in the following form or to the like effect, and must set forth in the form of answers to the questions contained in it sufficient facts to show that the claimant is entitled to be registered." Then followed the form and the questions—"1. What is your Christian name and surname? 2. What is your age? 3. What is your occupation? 4. What is your place of abode?" &c. It further enacted that "the claimant must give such a description of his place of abode as will enable it to be easily and clearly identified." Now, going back to *The Elections Act of 1885*, there is a form given there with a column for the Christian and surnames, and another for the place of residence; and two examples are given. One was "William Brown, Charlotte Street," and the other was "John Smith, Anni Street, Fortitude Valley." That, I think, should be something of a guide as to what the Legislature thought was a proper answer to the question 4 in the third section of *The Act of 1892*.

Now before I come to the particular facts the Court has to be formed. That Court—the Electoral Registration Court—had to adjudicate. When they come to adjudicate they have first of all to find out what is the particular thing that they have to adjudicate upon. And what they have to adjudicate upon there is whether the answer given to question 4—What is your place of abode?—is so answered that it is a description of the locality of the place of abode which will enable it to be easily and clearly identified. Now upon that, before adjudication, there arises a question of law with a question of fact behind it which might or might not arise. The justices of that Court are in the same position as a jury in this Court and a judge on this bench, but they exercise the function of Judge and jury together. Consequently they have to ascertain for themselves the legal aspect of the question which they have to determine, and then, having got the legal aspect, they have to determine whether the facts bring it within that or not. I think they ascertain what the law of the case is, and that the answer to question 4, coupled with the directions given for filling it up, which I have read, amounts to this: The claimant has to state his place of abode in such a manner as will enable a person of reasonable and ordinary understanding to easily and clearly identify it, using the ordinary and usual steps taken by a reasonable person to identify anything. Now, that being the law as I consider it is, I will see what the facts are. A man named Messenger presented this claim which was before the Court. In answer to the question—what is your place of abode? he wrote “Oriel Road, Hendra.” Looking at that address, I think that, *prima facie*, it is an address which is sufficient to enable a person of ordinary understanding—a reasonable person—with ordinary precautions to find it. If the magistrates had decided upon nothing more than the face of the document, I would say that they decided wrongly, but there was evidence that they brought to bear their local knowledge. The applicant stated that he lived in “Oriel Road,, Hendra” that Oriel Road was only

200 yards long, and that there were only two houses in it, in one of which he lived. Now the magistrates had brought into the question three-quarters of a mile of Oriel Road, Hendra, beyond the 200 yards. As the statement of the claimant had stood uncontradicted, this extra distance found by the magistrates could not be taken into consideration. Thus there were two residences in which the claimant could be found, and I think that, if the magistrates brought evidence to bear, that that evidence was not sufficient to sustain the verdict that Oriel Road, Hendra, did not properly describe the claimant's residence, even allowing him to reside in which of those houses he liked. As the facts turned out the magistrates having decided that it did not, it became the duty of the Electoral Registrar to post a letter to the claimant acquainting him with their decision. The officer posted the letter to the address “Oriel Road, Hendra,” and it reached the claimant on the following day. Consequently, I think that, if the magistrates decided as a matter of law on the face of the claim they decided wrongly, that if they did not decide on the face of the matter only they did so on the facts, and if they did so on the facts the facts were contrary to the legal construction of the Act and of the law, and consequently *mandamus* must be granted. Whether or not the *mandamus* must be granted on the second ground it is unnecessary for me to decide, but the inclination of my opinion is that it would go on that ground, but I do not give an absolute opinion. The practice of the Court, when magistrates appear, has been for a number of years when a rule is issued and the magistrates are protected at the Bar by the Crown, to deal with the Crown as an ordinary individual, and make them pay costs for learning the law. There was an old idea, which we exploded years ago, that it was for the good of the country that the Crown should be taught the law, and that, therefore, they should never have to pay costs. They now have to pay costs in the same way that other individuals have to do. In this case costs were not asked against the magistrates, but the magistrates,

having come at the expense of the Crown, in my opinion, if the rule is made absolute, it should be made absolute with costs. That is merely my decision.

REAL, J.: I am of the same opinion for the same reasons.

GRIFFITH, C.J.: I regret that in this case I am unable to agree with my brothers on the bench. It is quite possible that Robert Messenger is an aggrieved person; that he is entitled to registration as an elector of Toombul; and that the justices would have done wisely if they had entered his name on the electoral list; but this Court does not sit as a general Court of appeal from justices. It only corrects their proceedings when they commit mistakes of a certain kind. If they have a case properly before them for adjudication, and they decline on erroneous grounds to entertain it, then the Court will compel them to do so by *mandamus*. The question therefore in this case is whether the justices of the Registration Court for the electoral district of Toombul improperly declined to entertain Messenger's application. I will refer briefly to the statutes relating to the matter. *The Elections Act of 1885* followed an earlier *Act of 1879*. It provides for holding Quarterly Registration Courts, and it required that claims to registration should be made in a certain form—the form prescribed by sec. 30 of the Act. Sec. 81 requires the Electoral Registrar to produce the claims at the next sitting of the Court, and provides that the declaration in the claim shall be taken as *prima facie* evidence of the qualification claimed. If the claim is rejected the chairman of the Court is to endorse the cause of the rejection upon it, and the Electoral Registrar is to give notice of the rejection to the claimant. The 28th section appoints the days on which the Court is to sit for the purpose of adjudicating on claims to registration. Sec. 11 provides that the Court shall consist of the justices of the peace resident in the electoral district, but that any Police Magistrate may act whether resident in the district or not. So that it appears that the Court is to be a local Court

consisting of local justices. Their function is to adjudicate on claims, and they may reject claims. It is not contemplated by the Act that there should be any personal attendance of the claimant or that he should receive any notice before his claim was rejected, but it is provided that he shall receive notice if his claim is rejected. The course of proceedings has always been that the Electoral Registrar hands in the claims that he has received, and the Court goes through them. Those that appear not to be in accordance with the law they reject, and those which appear to be correct are passed, and the names of the claimants are put in the Quarterly List. Sec. 30 of the Act of 1885 provided a form of claim, which was a tabular form with columns for the particulars. That form was found to be unsatisfactory. I may observe that it was borrowed from an earlier Act. The second column of that form was to contain the same particulars as the second column in the annual list, in which the name of the street only is given in the description of residence, without further description of the actual locality. In 1886 the 30th section was repealed, and sec. 4 of *The Act of 1886* was substituted for it. In 1892 that section was repealed, and secs. 3, 4, 5, and 6 of *The Act of 1892* were substituted for it. Sec. 3 prescribes the form of claim, and sets out the particulars which are to be furnished by the claimant. The 10th section of *The Act of 1892* imposes on the Electoral Registrar the duty of making full and careful inquiry with respect to the qualifications of persons who claim to have their names inserted in the electoral roll, and provides that if the Electoral Registrar upon inquiry has reason to believe that any claimant is not qualified to be registered as an elector he shall send him a notice requiring him to attend and prove his qualification at the next Registration Court, and informing him that if he fails to attend either in person or by agent to prove his qualification, the claim will be rejected. Qualification in that section I understand to mean one of those qualifications which are enumerated in the 6th section of *The Act of 1885*, one of which is

residence for six months in the district. I do not think that that means that if the claim is informal, and does not show a right to be registered, the Registrar is to give notice to the claimant to come and prove that the facts are different from those stated in the claim, and that he is in fact entitled to have his name placed on the roll. I take it to mean that if on the face of the claim the claimant appears entitled to registration, but after inquiry the Registrar has reason to believe that the claim is not true in fact he is to give him notice to come and prove that it is true. That, however, is not a part of the sections which are to be read into the portion of *The Act of 1885* dealing with the procedure of the Registration Court; it is a substantive provision. I think that that ground, which was one taken in support of the rule, fails. The other point appears to me a more difficult one. The claimant is required (sec. 4) to give in his claim such a description of the locality of his place of abode as will enable it to be easily and clearly identified—he must (sec. 3) describe the locality of his place of residence so as to identify it. Now, whether a description of the locality of a place of abode is such as to enable it to be easily and clearly identified must be a question of fact varying in every case. It may be that a description which does not fix the locality within twenty miles would be such as to enable it to be clearly identified. It may be that a description which would fix the locality within fifty yards would not be such as would enable it to be easily and clearly identified. Not only does difficulty arise with regard to actual locality, but with respect to the person. If a man is carrying on a large business in a town it may be very easy to identify him if you merely mention the name of the street in which he is located, but if he is a groom or a labourer in the employment of somebody who lives in a certain street, the description of that man as living in that street might not be sufficient, although the same description in the case of his master might be quite sufficient. It seems to me to be a matter of degree in

every case, depending not only on the locality but on the occupation of the man. Who is to be the judge of the question? The law requires this condition to be complied with, and unless it is complied with I think that the claimant is not entitled to have his claim considered, and that the justices ought to reject it. In this case they have rejected it; and the chairman of the magistrates (Mr. Murray) has said that they were of opinion that the claimant had not complied with this condition, and therefore they rejected his claim. It appears that two of the justices were residents in the district. I have already pointed out that the Act contemplated that claimants should not be in attendance. Written claims are to be placed before the Bench, and they have to either pass them or reject them. It appears to follow that the justices are to use their local knowledge, and to do what is called taking judicial notice of the circumstances of the district with which they are dealing—*i.e.*, to ascertain the facts for themselves without formal evidence. If that is so the justices must be taken to have known the locality—I do not mean that they should be taken to know every house in it, but to have a general knowledge of the locality and the distribution of population in it. They used that knowledge, and they were of opinion that the description given in the present claim was not sufficient to enable the locality of the place of abode to be easily and clearly identified. On that ground they declined to entertain the claim. In that sense they declined jurisdiction. Can this Court review their decision? I feel great difficulty in holding that we can review the decision of justices on a question of fact of that kind. I do not know of any authority showing that this Court can review their finding. I know of many authorities to the contrary. One case is that of *The Queen v. JJ. of Leicester*, 15 Q.B., 871. If this was a question of fact for the justices to decide, I think that we have no power to review their decision. That is where I feel the difficulty. It may be that they decided wrongly; it may be that if the matter were before us

we should decide it otherwise, but if it was for the justices to decide, and they were at liberty to apply their local knowledge in deciding it, how can we, with merely the additional statement made by the applicant, say that the justices were wrong? Taking the whole of the circumstances of the case into consideration, however, I am disposed to think that I should have come to the same conclusion that they have done. That may be my ignorance—my local ignorance—but the justices are supposed to have local knowledge. For the reasons that I have given, I think that the Court can not grant a *mandamus*, even if there were no doubt that the claimant is entitled to be on the roll. I think, therefore, that the rule ought to be discharged, but as my brother judges are of the contrary opinion it will be made absolute.

HARDING, J.: The rule will be made absolute with costs.

GRIFFITH, C.J.: I wish to state with respect to costs, that, apart from the rest of my judgment, I think that no costs ought to be allowed, and that if the rule were discharged it should be without costs. Costs have never been given against justices when a writ of *mandamus* has been granted, unless they have been guilty of some misconduct, and to make them pay costs in this case merely because their counsel is instructed by the Crown Solicitor appears to me to be punishing the Crown for assisting the Court when not a farthing's additional expense has been caused.

REAL, J.: My experience of the practice of the Court does not go as far as that of the learned Chief Justice, but so far as I know costs have always been given when the parties appeared and argued, unless there are some exceptional circumstances.

Solicitors for claimant: *J. N. Robinson & Co.*

Solicitor for justices: *J. Howard Gill, Crown Solicitor.*

REGINA v. CASTLES AND OTHERS (JUSTICES).

Certiorari—Discretion—Conduct of applicant—Appeal from justices.

The grant of a *certiorari* is in the discretion of the Court, and even, where a person is aggrieved, he may have acted in such a way as to preclude his making an objection to jurisdiction.

An appeal from an order of justices was heard in the District Court, and dismissed on the merits. A writ of *certiorari* was applied for, on the ground that one of the justices was an interested party: the fact of the appeal was suppressed at the application for the rule *nisi*. The Full Court refused the writ.

RULE *nisi* for a *certiorari* to bring up the record in a complaint by W. E. Burns against the Tingalpa Divisional Board under ss. 242, 243, of *The Local Government Act of 1878* for damages for the removal of gravel, on the ground that one of the justices, being a ratepayer, was an interested party.

The plaintiff being dissatisfied with the order appealed to the District Court, where Noel, D.C.J., dismissed the appeal with costs.

Power and Fewings, for the defendant, raised a preliminary objection that the matter was *res judicata*, and no mention of the appeal was made when the rule *nisi* was granted by Harding, J. *Eastern Miner's G. M. Co. v. Sellheim*, 4 Q.L.J., 158, 159.

REAL, J., referred to the decision of the Full Court in *Garde's case*, 4 Q.L.J., 9.

Perské moved the rule absolute, and submitted *certiorari* lies after appeal. *R. v. Jukes*, 5 R.R., 445; 8 T.R., 542. [HARDING, J.: Not where the fact of appeal has been suppressed. *Paley's Summary Convictions*, 358, 359. On an *ex parte* application everything should be disclosed.] *Certiorari* will lie at any time. [REAL, J.: Yes, where the defect can not be cured.] There was no re-hearing in the District Court. The Judge said there was evidence on both sides. The Court having notice that the case was originally tried before a Court of incompetent jurisdiction will take cognizance of that fact and not allow the original decision to stand. *R. v. Cheltenham Commissioners*, 1 Q.B., 467.

HARDING, J., referred to *R. v. JJ. Salop*, 2 El. & El., 386.

GRIFFITH, C.J.: This is a rule *nisi* for a *certiorari* to bring up the proceedings on a complaint against the Tingalpa Divisional Board, in which an order was made in favour of the plaintiff, but not so much in his favour as he desired. He objects to the constitution of the Court of Petty Sessions, on the ground that William Castles, one of the justices, was an interested party. The order was appealed from to the District Court, one of the grounds of appeal being the alleged interest of Castles: other grounds related to the merits of the case. The writ of *certiorari*, although it is ordinarily granted when a court is improperly constituted, is a discretionary writ, and is not granted *ex debito justitiæ*; and, to use the words of Ashhurst, J., in *R. v. Bass* (5 T.R., 251: "As it is discretionary in the court to grant or refuse the writ, I think we shall but use that discretion in refusing the writ in this case." The applicant, being dissatisfied with the decision of the Court of Petty Sessions, first appealed to the District Court, where the whole merits of the case were submitted to the Judge, who decided against him. The appeal to the District Court was not mentioned when the rule *nisi* was applied for, but the Court was asked to set aside the original decision, on the ground that the applicant had since discovered that Castles was a ratepayer. I think the applicant by his conduct has deprived himself of any right to obtain a writ of *certiorari*, and in my opinion the writ should be refused, and the rule discharged with costs.

HARDING and REAL, JJ., concurred.

Solicitor for applicant: *F. G. Hamilton*.

Solicitor for respondents: *H. E. Smith*.

THE QUEEN v. LICENSING JUSTICES OF NORTH
BRISBANE.

Mandamus—Licensed victualler's license—Transfer—Mortgage—Insolvency of licensee—Licensing Act of 1885 (49 Vic., No. 18), ss. 43, 55—Costs—Special Case.

D., the lessee of premises licensed for the sale of liquor, sold the lease, license, and goodwill thereof to C., and as security for the payment of the purchase money C. executed a bill of sale over the lease, license, goodwill, and stock, and in the bill of sale was an absolute power of attorney to D. to sign transfers on behalf of C., and to apply for renewals of the license. D. signed a transfer of the license to S., and on the date that the application was lodged C. filed his petition for the liquidation of his affairs. C.'s trustee obtained a permit to carry on the business. The Licensing Bench refused to entertain the application for a transfer to S., as the transfer was made by D., and not by C.'s trustee.

Held that *mandamus* should issue to compel the justices to hear the application for the transfer.

The jurisdiction of the Court to grant a *mandamus* is not ousted when a new and equally expeditious remedy is created. As the relief could have been obtained by a special case, the costs were limited to those of a special case.

RULE *nisi* for a writ of *mandamus* calling on the licensing justices of Brisbane to show cause why they should not grant to the applicant a transfer of the license of the Royal Hotel, Queen Street, and a renewal of the license of those premises, on the ground that it was not shown to the licensing authority that the applicant was disentitled to the transfer or the renewal of the license, and that no objection was taken at the hearing of the application to it being granted. C. H. Daniell was the lessee of the premises, and sold the lease, license, and goodwill to G. E. Cooper. Part of the purchase money was paid in cash, and as security for the remainder Cooper executed a bill of sale over the lease, license, goodwill, and stock. In that bill of sale absolute powers of attorney were given to Daniell to sign transfers on behalf of Cooper and apply for renewals of the license. On 12th March last Daniell signed a transfer of the license to Steadman, and an application for the transfer of the license was lodged with the clerk of petty sessions on 18th March. A copy of the transfer was also advertised. On the same day Cooper filed a petition for the liquidation by arrangement of his affairs. A general meeting of his creditors was held on the 29th March, when it was resolved that his affairs should be liquidated by arrangement, and Thomas Welsby was appointed his trustee.

On 31st March, Welsby applied to Mr. Pinnock, P.M., and obtained a permit for Cooper as agent for the trustee to carry on the business of the Royal Hotel. The application for the transfer of the license from Daniell to Steadman came on before the licensing authority on 4th April, and it was adjourned first to the 11th April and then to 2nd May. On the latter date they refused to grant the transfer to Steadman on the ground that as the license was then held by Welsby as trustee in the estate of Cooper, the late licensee of the hotel, they had no power to grant it. Welsby was present in Court when the application for the transfer came on, but he raised no objection. On 13th April a notice appeared in the *Brisbane Courier* of an application to be made to the Court for the transfer of the license to G. E. Cooper.

Byrnes, A.G., and *MacDonnell*, for Steadman, moved the rule absolute.

Shand and *Powers*, for Cooper, to shew cause.

Byrnes, A.G., stated that the justices considered Steadman had no *locus standi*. They thought they could recognise no one but Cooper's trustee. They ought to have heard and determined Steadman's application. *Atkinson v. Pinnock*, 2 Q.L.J., 138; *re Macfarlane*, 3 Q.L.J., 60. *Mandamus* is the proper remedy. *R. v. Justices of Essex*, 11 Q.B.D., 704; *R. v. De Rutzen*, 1 Q.B.D., 55. On the merits *Garrett v. Justices of Middlesex*, 12 Q.B.D., 620; and *re O'Brien*, L.R. (Ir.), 11 Ch., 213, were referred to.

Shand submitted that as the magistrates had exercised their jurisdiction *mandamus* did not lie. The trustee was the holder of the license, and if he did not consent to the transfer to Steadman no transfer could take place. If he withheld his consent wrongly that could not be rectified by *mandamus*. The real point is whether the trustees' consent was necessary, and that could be decided by special case. *R. v. Recorder of Liverpool*, 20 L.J. (M.C.), 35; *R. v. Blanshard*, 13 Q.B., 318; *Rex v. Justices of Fairingdon*, 4 D. & R., 735. Sec. 55 of *The Licensing Act* never contemplated two persons being the holders of one license at the same time, and the decision of the justices was right.

Powers followed and cited *Symons v. Wedmore*, 1894, 1 Q.B., 401; *Queen v. Hughes*, 1893, 2 Q.B., 538; *R. v. Alley, ex parte Slack*, 9 V.L.R., 302; *R. v. Registrar Joint Stock Companies*, 21 Q.B.D., 181; *R. v. Smith*, 3 Q.B.D., 374; and *R. v. Sykes*, 1 Q.B.D., 52.

GRIFFITH, C.J.: This case raises the question of the rights of a person claiming to be a mortgagee of a licensed victualler's license, mortgaged to him in conjunction with a mortgage of the goodwill and lease and the property upon the premises. The security contained an irrevocable power of attorney to the mortgagee to make all necessary applications on behalf of the mortgagor for the renewal and transfer of the license. It was not seriously contended that the right of a licensee to a license is not in the nature of property, or that the ordinary rules of property in regard to mortgage or assignment, except so far as excluded by some statutory provision, apply to property of that kind. That view is supported by the decision in the case of *Garrett v. The Justices of Middlesex*. In this case Daniell, by virtue of his irrevocable power of attorney from Cooper, applied on March 13, 1894, for a transfer of the license to Steadman. On the same day on which the application was lodged Cooper filed a petition in liquidation under *The Insolvency Act*, as a result of which Welsby was appointed trustee, and, exercising the powers conferred upon him by sec. 55 of *The Licensing Act*, obtained from the Police Magistrate permission to carry on the business during the currency of the license. When the application made by Daniell, as attorney for Cooper, came on to be dealt with, the Bench, knowing of the insolvency and of the permit which had been granted to Welsby as trustee, thought they could not deal with the matter, the application being made by Daniell as attorney for Cooper, and decided that for that reason they had no power to entertain the application. The question raised before us is whether they were right in that decision. It is clear that they did not hear and determine any of the questions which by sec. 48 of *The Licensing Act* are to be matters

for judicial determination, and which are principally personal to the transferee. They decided merely that the application was not properly made by the licensee. If it is the law, which was scarcely disputed, that such property may be mortgaged, and that the mortgagor may give a power of attorney to the mortgagee to apply for a transfer of the license, it follows that they ought to have entertained the application. Their decision was therefore erroneous as to a matter of law, and preliminary to the exercise of their jurisdiction. It seems quite clear that they did not exercise their jurisdiction of dealing with the application for the transfer. An application was also before the justices on the part of Cooper, to whom Welsby proposed to transfer the license, Cooper having then obtained his certificate, and it was contended that on the true construction of *The Licensing Act* a license held in the name of the insolvent cannot be transferred except upon the application of the trustee. That is sought to be inferred from section 55 of *The Act*. If, however, a license is capable of being mortgaged, and a valid mortgage existed, then the application made by Daniell under the power of attorney in the mortgage was as good as if it had been made by Cooper himself, whose insolvency could not deprive Daniell of any right he previously had. Unless, therefore, the section of the statute either expressly or by necessary implication excludes Daniell's right, the justices were wrong. Section 55 provides for the protection of the license in the case of insolvency until it can be beneficially disposed of by the persons entitled to do so, and for that purpose the trustee of an insolvent person may apply for permission to carry on the business. That is necessary, because if it is not carried on, the license is liable to forfeiture. But all securities of that kind are precarious. There is not only the possibility of the mortgagor becoming insolvent, but he might run away, and if the mortgagee could not get the license transferred to somebody else, the property might be treated as abandoned, and the license would be liable to forfeiture. The Crown might

not take advantage of it, but the right would arise. I remember a case in this Court of an equitable mortgage of the lease of a public house which contained a condition that it should be forfeited upon alienation. The equitable mortgage was held to be valid, but the security was of somewhat doubtful value. I cannot see anything in sec. 55 to exclude the ordinary operation of the law regarding property capable of being mortgaged, or to prevent a license from being dealt with by way of mortgage, subject to the provisions of the Act. The trustee had, if not the legal right to the license, at least a formal right to hold the license for the persons beneficially entitled to it. It may be doubtful whether the beneficial interest in the license passed to him at all, although he was the only person entitled to make application to protect it. I do not see anything to exclude the right of Daniell as mortgagee, and as attorney under a power of attorney given for a valuable consideration, to make application for the transfer of the license.

It was contended for the respondents that the point could have been raised by way of a special case. It appears that such points have been raised in that way in England, notably in the case of *Symons v. Wedmore* (1894), 1 Q.B., 401, in December last. It is a general rule that where there is another remedy equally expeditious and satisfactory a *mandamus* will not be granted, but I think that the jurisdiction of the Court to grant a *mandamus* is not ousted by the creation by the Legislature of another remedy. We are not, I think, precluded from granting a *mandamus* by that fact, but under ordinary circumstances we should refuse to do so. In the present case I think the Court should emphasise its opinion on that point by not giving the prosecutor his costs, as the case might have been brought in a simpler and less expensive method. It seems to me that the application for the transfer ought to be heard and determined, and that the order *nisi* for the writ of *mandamus* should be made absolute.

HARDING and REAL, JJ., concurred.

Byrnes, A.G., submitted that his client was

entitled at any rate to the costs of a special case, and on the question of *mandamus* cited *R. v. Thomas*, 8 *Times* B., 299.

The order was made absolute for *mandamus* with costs, such costs not to exceed those of a special case.

Solicitor for applicant: *Leeper*.

Solicitors for licensee: *J. N. Robinson & Co.*

PLANT v. ROLLSTON.

Goldfields Act of 1874 (38 Vic., No. 11), ss. 2, 10, 14—Mining lease—Trespass—Crown lands—Royal mine.

The plaintiff applied for a mining lease of land situated within the Charters Towers Goldfield, which had been granted by the Crown in fee to other persons. Before the application was granted the defendant, not being the occupier of such lands, by means of a side drive from adjoining land, entered upon a gold-bearing reef six hundred feet under the surface, and removed gold therefrom. The plaintiff sued the defendant under s. 14 of *The Goldfields Act of 1874* for trespass.

Held that a royal mine under land granted in fee is not Crown lands within the meaning of *The Goldfields Act of 1874*, and cannot be leased for mining purposes, and that therefore the plaintiff's action failed.

Held also by Griffith, C.J., and Real, J., overruling *Plant v. Attorney-General*, 5 Q.L.J., 57, that a grant in fee from the Crown confers upon the grantee possession of a royal mine lying under the land, and that an action is maintainable at his suit against a trespasser working the mine without license or authority from the Crown.

SPECIAL case stated for the opinion of the Court under *The Goldfields Act of 1874*.

The plaintiff was a mining proprietor, residing at Charters Towers, and the defendant, a mining manager, also residing at Charters Towers. By a proclamation issued under the hand of the Governor of Queensland, and dated August 29, 1872, certain Crown lands in the Colony, including the land thereafter granted by the Crown as hereafter mentioned, were duly proclaimed a goldfield within the meaning and for the purposes of the Act, 20 Vic., No. 29, by the name of the Charters Towers goldfield. By another proclamation issued under the hand of the Governor, dated February 8, 1876, certain Crown lands, including

the said land thereafter granted by the Crown, were duly proclaimed a goldfield within the meaning and for the purposes of *The Goldfields Act of 1874*, by the name of the Charters Towers goldfield, and by the last proclamation the first proclamation was cancelled as far as related to the goldfield. By deed of grant issued under the hand of the then Governor, dated May 10, 1877, and registered under the provisions of *The Real Property Act of 1861*, Her Majesty granted to C. S. Dickin, R. Robinson, and T. Mills all that allotment or parcel of land, containing 2 acres 1 rood, situated in the county of Davenport, parish of Charters Towers, and town of Charters Towers, being allotment No. 2 of section No. 16, with all the rights and appurtenances whatsoever thereto belonging, to hold the same for ever subject to the annual payment of a quit rent of one peppercorn for ever, if demanded, and by the deed the Crown reserved unto itself all mines of coal, and also full power to make and conduct through the said land all common or public drains and sewers which might be deemed expedient. On or about March 29, 1894, the plaintiff under and in accordance with the provisions of *The Goldfields Act of 1874*, and the regulations made thereon, duly applied for a 21 years' lease for gold mining purposes of all Crown lands situate on or under the surface of the said land so granted by the Crown; but the application had not yet been granted. Subsequent to that application, the defendant, without having ever been in lawful occupation of any ground situated on or under the surface of the land so granted, and without having ever been authorised in that behalf, by means of a side drive from property adjoining the said land, entered upon, occupied, and interfered with a vein of auriferous quartz situated at a depth of 600 feet under the surface of the ground, and took and removed gold and auriferous quartz from under the surface. The contention of the plaintiff was that under the circumstances he was entitled to proceed against the defendant for trespass or encroachment, and for damages in respect thereof, and for the recovery of the gold

so taken by the defendant, or the value thereof, and for an injunction. The defendant contended that the plaintiff was not so entitled, because the ground so entered upon, and the gold taken was not Crown land within the meaning of *The Goldfields Act of 1874*, or capable of being applied for or leased thereunder for gold mining purposes. The question for the decision of the Court was whether gold or other auriferous quartz situate on or under the surface of the land so granted by the Crown as aforesaid is Crown lands within the meaning of *The Goldfields Act, 1874*, and capable of being leased by the Crown thereunder for gold mining purposes.

Lilley and Shand for the plaintiff.

Byrnes, A.G., and *Fees* for the defendant Rollston. *Lukin* for the other defendants, the freeholders.

The arguments and authorities cited appear sufficiently from the judgments.

GRIFFITH, C.J.: The plaintiff's claim is founded on sec. 14 of *The Goldfields Act of 1874*, which provides that the entry upon or interference with any ground of which a mining lease has been duly applied for, if made by a person who is not, prior to the application, in lawful occupation of the ground, shall, from the lodging of the application and until it has been refused, or the entry or interference has been authorised by the Government, be deemed to be an actionable trespass. The applicant acquires in effect by his mere application a provisional license from the State to mine for gold in the land for a lease of which he applies. The defendant Rollston entered upon the locus in question after the plaintiff had made application in proper form for a mining lease of the locus. If, therefore, it was property of which a mining lease could be granted under the Act, the plaintiff is entitled to maintain this action. The locus in question is a portion of a gold-bearing reef, about 600 feet below the surface of the ground. The land beneath the surface of which it is situated is within the Charters Towers goldfield, and was granted by the Crown in fee, after the proclamation of the goldfield, to persons whose

rights as freeholders are held by the defendants other than Rollston. The plaintiff contends that the locus in dispute being a royal mine was excepted from the grant in fee, and that, consequently, both the mine itself and the possession of it remained in the Crown, and the mine continued to be Crown lands within the meaning of *The Goldfields Act*; so that a mining lease of it could be lawfully granted under sec. 10 of the Act. He relies upon the *Case of Mines*, 1 Plow, 810, and upon the case of *Plant v. Attorney-General and others*, decided by Harding, J., in June last (5 Q.L.J., 57), in which that learned judge held, in an action for trespass and for an injunction, at the suit of the present plaintiff, that a grant in fee from the Crown confers upon the grantee neither property in nor possession of a royal mine lying under the land comprised in the grant, and that consequently no action is maintainable at his suit against a trespasser working the mine without license or authority from the Crown. The defendant contends that even if this is the true view of the position of the grantee, a point which he does not care to dispute, yet a royal mine under land granted in fee is not Crown lands within the meaning of *The Goldfields Act*, and is, therefore, not open to be leased for mining purposes, and that, consequently, the plaintiff has no title to maintain the action. Before dealing with the contention that a royal mine so situated is Crown lands within the meaning of the Act, it appears to me to be necessary to consider in the first place whether royal mines are excepted or reserved from grants in the sense in which these words are used in speaking of exceptions or reservations from a conveyance between subjects; whether, in short, the case of *Plant v. Attorney-General* was rightly decided. Otherwise the Court would be deciding a mere abstract question. The point, is, moreover, of great consequence to all grantees of land in Queensland, whether the land lies within or beyond the limits of a goldfield. It is settled that, upon a conveyance of freehold land between subjects, containing an exception or reservation of the mines, the purchaser acquires

neither title to the mines nor possession of them, but that both title and possession remain in the vendor. But upon a lease of land containing mines, although the lessee acquires no right to work the minerals, he has possession of the mines, and may maintain an action for trespass against a stranger (*Keyse v. Powell*, 2 E. & B., 132; 22 L.J.Q.B., 305). So in the case of copyholds. Although the copyholder acquires no right to work the mines, he has possession of them and may maintain an action for trespass against a stranger, and even against the lord (*Eardley v. Lord Granville*, 3 Ch. D., 826). This right seems to have been first disputed in the case of *Lewis v. Branthwaite*, 2 B. & Ad., 437. In all these cases there is no doubt about the right of possession either in law or in fact; it is definitely known to whom it belongs. If what I may call the freehold rule applies to the case of royal mines, it would follow that the possession of a royal mine remains in the Crown, and that the grantee of land containing such a mine, having neither title nor possession, cannot maintain an action for interference with the mine, even against a stranger acting without license or authority from the Crown. Moreover, as any person would be at liberty to work such a mine, it would be a good defence to an action for trespass to any land held under a Crown grant to plead that the locus on which the trespass was committed is a royal mine, without any allegation that the defendant acted under a Crown license. The truth of such a defence would in many cases be practically incapable of either proof or disproof until the lapse of a considerable time, as will be manifest to any one familiar, as we are, with the conditions under which gold is found in Australia. We know that it is found sometimes in reefs or veins, varying in thickness from a few inches to many feet, and which sometimes are apparent as outcrops on the surface for a short or a considerable distance, and sometimes are discovered for the first time at a great depth. These veins lie at all angles with the horizon, being sometimes nearly horizontal, but for the most part dipping into the earth in a plane

more or less approaching the perpendicular. In other cases the gold is found in alluvial deposit, sometimes in surface soil, which is permeated with it for a depth of many feet, and sometimes again in an alluvial stratum underlying volcanic rocks at any depth from the surface. In other cases again—notably in the case of the celebrated Mount Morgan mine—the gold is found permeating the whole of the soil and rocks for a depth of hundreds of feet, and over an area of many acres. But in all these cases the existence of the gold in any particular portion of the ground is at first uncertain, and can only be ascertained by actual working. A reef may be barren for hundreds of feet, and then become gold-bearing. It may happen that the whole of a reef under one freehold is barren, and is consequently not a royal mine, while under the adjoining freehold it is gold-bearing, and is a royal mine. In the former case, if an action were brought by the freeholder against a stranger for trespassing by working the reef, and the defendant pleaded that it was a royal mine, the truth of the plea could not be ascertained until the whole of the reef had been worked out, which might take months or years. If no gold were found in it, the defendant would be proved to have been a trespasser *ab initio*. If gold were found he would not. In the case of surface soil alleged to be a royal mine the same difficulty would present itself in an aggravated degree. And I suppose that the quantity of gold in the mine would not be a material consideration, inasmuch as the right of the Crown extends in law to all the gold found, whatever may have been the cost of extraction, although in practice, of course, the Crown's prerogative would not be asserted if the cost of extraction exceeded the value of the gold. (See, however, per Lindley, L.J., in *Attorney-General v. Morgan*, 1891, 1 Ch. at p. 456.) If, however, the Crown's possession of the mine, as a royal mine, were dependent on such an uncertain contingency, the confusion would only be increased; for the cost of extraction is dependent upon a hundred circumstances—situation, accessibility, rate of wages, the nature of the

minerals associated with the gold, the kind of machinery or appliances available, the means of the adventurers to employ the latest discoveries of science, the efficiency of management—most of which are liable to alter from day to day. So that it might, and frequently would, happen that a mine which is not a royal mine to-day would next week, by the opening of a new railway or a new discovery as to the mode of extracting gold from refractory ores, become a royal mine, and would next year, from a falling off in the quantity of gold in the ore or a change in the minerals with which it is associated, again cease to be a royal mine. It follows that in many large tracts of land in Queensland, inasmuch as it cannot certainly be predicted that in any place no gold, or no gold which can be profitably extracted, is present in the soil, it would be uncertain whether any freeholder is in possession of any particular part of his freehold or not. The extraordinary inconveniences that would follow from holding that a Crown licensee is entitled to enter upon any freehold land and search for gold are admirably pointed out in the judgment of the Supreme Court of California, cited to this Court during the argument from *Blanchard and Week's* leading cases (p. 151, *et seq.*). And although these arguments are not strictly in point, if a Crown licensee is, as was held in the *Case of Mines*, entitled to enter and make such search, they are none the less forcible as applied to the hypothesis that the possession of royal mines is in the Crown, so that no action will lie except at the suit of the Crown for a trespass by a stranger without the Crown's license. The common law attached great importance to certainty of possession in the case of land. Hence the strictness of the rule requiring livery of seisin, *i.e.*, a public transference of actual possession. I have shown that the consequence of holding that royal mines in freehold lands are not in the possession of the grantee would be to introduce, in place of the certainty as to possession so much favoured by the common law, an endless confusion. While these considerations are not, perhaps, conclusive of the

matter now in question, they are, I think, of sufficient weight to require a careful examination of the arguments which would lead to such a result, especially when, as here, the claim is based upon a supposed rule of the common law. For, whether the somewhat extravagant eulogies that have been passed upon that system of law are justified or not, it is not, I think, too much to say that the common law never prescribes as a duty, or declares as a rule of law, any act or proposition that would lead to manifest confusion, inconvenience, or injustice. And by this test I think that any suggested rule of the common law, not supported by express judicial decision, may be tried. The general rule undoubtedly is that possession of the surface of land implies possession of everything beneath the surface. And this rule *prima facie* applies in the case of mines. In *Keyse v. Powell (ubi supra)*, Lord Campbell, in delivering the considered judgment of the Court of Queen's Bench, used the following language: "The surface and the minerals may be dissevered in title, and become separate tenements, as appears abundantly from the cases cited. But the presumption is to the contrary; and here there is nothing to rebut the presumption down to the time when the Case of the minerals was granted." I conceive that this is a correct statement of the common law on the subject, as to all mines other than royal mines. In that case the question was as to severance in title, and not, as in the present case, as to severance in possession. But the rule is clearly equally applicable in principle to the question of possession. I proceed then to inquire whether there is any authority for holding that there is a severance of possession in the case of royal mines. The statute 5 W. & M., c. 56, distinctly speaks of the freeholders of the land as the "proprietors" (s. 2) and as the "owners" (5-8) of the mines, although recognising the royal prerogative to the gold. And see *Attorney-General v. Morgan* (1891, 1 Ch., 432). In a long series of cases in the colony of Victoria, decided by that most learned judge, Molesworth, J., who has been called the father of Australian

mining law, it has been assumed that the possession of a royal mine under freehold land is in the freeholder. In *Miller v. Wildish*, 2 W. & W., Eq., 37, that learned judge refused relief to a freeholder complaining of a trespass to a gold mine on his freehold because the freeholder was not beneficially entitled to the gold, and because he thought the trespass to the goldbearing stratum was not such a permanent injury as to entitle the plaintiff to an injunction. In later cases, however, which were cited in *Woolley v. Ironstone Gold Mining Company*, 1 V.L.R., Eq., 237, he held that an actual commencement of mining operations on the land by the freeholder himself, and, finally, that an intention to commence such operations, was sufficient to entitle him to an injunction against a stranger. In the last-mentioned case, which was a bill for an injunction against a trespasser, and for a declaration of the freeholder's right to the gold as against the Crown, the learned judge allowed a demurrer by the Attorney-General, which decision was affirmed by the Privy Council (*Woolley v. Attorney-General of Victoria*, 2 App. Cases, 163) but overruled the demurrer of the other defendants. The difficulty that he felt in the earlier cases, and apparently to some extent all through, as to the plaintiff's right to an injunction, is removed by the decisions in *Goodson v. Richardson* (L.R., 9 Ch., 221), and *Eardley v. Lord Granville* (3 Ch. D., 826). The doctrine that the freeholder was not in possession of the royal mine seems never to have occurred to anyone. The later case of *R. v. Davies* (6 W.W. & a'B., 246), before the Full Supreme Court of Victoria, necessarily involves the same assumption that the mine is in the possession of the freeholder, and that the doctrine which is applicable to the case of an express reservation of mines in a conveyance between subjects does not extend to royal mines. In the case of *Attorney-General v. Morgan*, already cited, Lindley, L.J., states the rule thus (p. 455)—“At common law all gold and silver occurring in any mine in England or Wales belonged to the Crown.” He does not suggest that there is an implied reservation of the mine

itself from the grant. The earlier Australian statutes relating to gold mines—to which I will presently refer—also recognise the right of a freeholder to possession of the soil in which the gold is found. So far, convenience, principle, and authority seem to lead to the same conclusion—namely, that the ordinary rule as to possession of land applies to the case of royal mines. What authority is to be found to the contrary? In my opinion none, except *Plant's case* itself, as I will endeavour to show. The resolution of the judges in the *Case of Mines* (1 Plow., 310) was (p. 336) (1) that by the law all mines of gold and silver within the realm, whether they be in the lands of the Queen or of subjects, belong to the Queen by prerogative, (2) with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore. The doctrine of the second part of the resolution was, however, doubted, and indeed dissented from, by Lord Hardwicke, in the case of *Lydal v. Weston* (2 Atkyns, 20); and it appears that no instance is to be found of an assertion of the right of entry without the freeholder's consent since the case of *Mines* was decided. In the case before Lord Hardwicke, there was an express reservation of royal mines. But, if there is in all cases an implied reservation of royal mines having the same effect as an express reservation in a conveyance between subjects, the objection which in that case was raised to the title on the ground of the reservation would seem to have been futile, inasmuch as it must exist alike in all cases of land granted by the Crown to a subject. It is to be observed, moreover, that the arguments in support of the second part of the resolution, in the *Case of Mines*, were not based upon a severance of possession in the case of royal mines, but assumed that the possession of them was in the grantee. It was contended that such a possession was not inconsistent with a right of the Crown to enter for certain purposes, such as taking timber for ships, just as a subject might have a corresponding right by prescription to certain rights over the

land of the Crown. See, too, the case of *Saltpetre Mines* (12 Rep., 12). Indeed, if the possession of the mines had not been assumed to be in the grantee, it is difficult to see how the question of the rights of the Crown's licensee to enter the lands of a subject could have arisen. The grantee would have had neither title nor possession, and any one might have worked the royal mines without exposing himself to any complaint at his suit. The analogy between the prerogative right of the Crown as lord *in capite* to royal mines in the freehold lands of a subject and that of the lord of the manor to mines in copyhold lands must, I think, have been present to the minds of the judges—much more present indeed than to us who live in a country where copyhold tenures have not been introduced. And the language of the first part of the resolution itself, even without calling in aid the second part, appears to indicate that the prerogative right of the Crown, which was the subject of discussion, was regarded in this light. That language would, I think, accurately express the relative rights of the lord and the copyholder. The difference between the right to minerals, with or without a right to enter and remove them, which is all that the second part of the resolution covers, and the right to mines themselves as a distinct corporeal hereditament is clearly shown by the case of *Wilkinson v. Proud* (11 M. & W., 33), in which the *Case of Mines* was cited and relied upon for the defendant. It was pointed out in that case that mines considered as a corporeal hereditament severed from the land in which they lie, pass by livery, while the right to enter and remove minerals is an incorporeal hereditament and lies in grant. This is entirely consistent with the resolution in the *Case of Mines*. The notion, indeed, of treating the prerogative right of the Crown to royal mines as a corporeal hereditament seems incongruous. I think that in principle the analogy between the respective rights of a copyholder and the lord in the *Case of Mines* lying under a copyhold, and the rights of the subject and the Crown in the case of royal mines lying under a freehold is complete, with the

single exception of the right of the Crown in the latter case to enter and take the gold or silver—a right which has been for centuries in abeyance, if it still exists. If the rule contended for by the plaintiff is the true one, it would follow that royal mines lying under a copyhold are not in the possession of the copyholder, although all other mines lying under it are in his possession. I do not think that such a conclusion is consistent with the settled law on the subject. The judgment of Lord Campbell, C., in the case of *Bowser v. Maclean* (2 D.F. & J., 415), I think, entirely bears out this view of the analogy between the prerogative rights of the Crown with respect to royal mines within the realm and the rights of the lord of the manor with respect to minerals within the manor. It seems to me that the whole argument is founded upon a mistaken construction of the words of the resolution in the *Case of Mines*. Even admitting that the words of the resolution are capable of that construction, yet, as the question now under consideration did not arise, and was evidently not present to the minds of the judges, who on the contrary in dealing with the second point proceeded on an assumption inconsistent with the construction now contended for, I think that their language ought not to be held to have a meaning which they could not have intended it to convey, and which is neither its necessary nor its primary meaning. The other authority mainly relied upon by the plaintiff was a passage in the judgment in the case of *Attorney-General of British Columbia v. Attorney-General of Canada* (14 App. Cases, 295), which is in these words:—"According to the law of England, gold and silver mines, until they have been aptly severed from the title of the Crown and vested in a subject, are not regarded as *partes soli*, or as incidents of the land in which they are found. Not only so, but the right of the Crown to land and the baser metals which it contains stands upon a different title from that to which its right to the precious metals must be ascribed" (p. 302). The question for decision in that case was not whether the Dominion of Canada had such a possession of

the royal mines under the lands in question as would enable them to maintain trespass against a stranger, but whether the beneficial interest in the mines passed by the statute which operated as a conveyance of the land under which they lay. It was held that the word "lands" used in the statute was not sufficient to convey this interest. And the words of the judgment, if I may say so with respect, appear apt and sufficient to express that conclusion. I cannot agree that they should be read as involving a decision of a question which did not arise in the case, which was not argued, and which, if decided in the sense now contended for, would have had the effect of overruling a long course of decisions in Victoria, which, so far as my knowledge extends, have been accepted, not only in that colony, but in New South Wales and Queensland, as correctly declaring the law, and have been the basis in all three colonies of much subsequent legislation dealing with the difficult question of giving effect to the Crown's right to work royal mines in the lands of subjects. For these reasons I am of opinion that the case of *Plant v. the Attorney-General* was wrongly decided, and that the mine in question in this action was, when the plaintiff made his application for a lease, not in the possession of the Crown, but in the possession of the lessees from the freeholder. It follows that the whole foundation of the plaintiff's claim is gone. For it could not be, nor indeed was it, contended that a mere right to enter and take gold lying under land granted to a subject is included in the term "Crown lands," of which alone a mining lease can lawfully be granted. This is sufficient for the decision of the case. Having regard, however, to the importance of the matter, and understanding that the case is to go further, I proceed to express my opinion on the plaintiff's contention that assuming the mine in question to have been reserved or excepted from the grant, and to have consequently remained in the possession of the Crown, it was "Crown land" within the meaning of *The Goldfields Act*. The term "Crown lands" as used in the Act is defined (section 2) to mean, unless the context otherwise

requires, "all lands vested in Her Majesty which have not been dedicated to any public purpose, or which have not been granted in fee or lawfully contracted to be so granted, or which are not under lease for purposes other than pastoral purposes." By *The Acts Shortening Act* (31 Vic., No. 65, s. 11) the word "land" in Acts of Parliament passed after the coming into operation of that Act is declared to include tenements and hereditaments corporeal and incorporeal of any tenure or description, unless where there are words to restrict the meaning to tenements of some particular tenure or to some particular estate or interest. The plaintiff contended that the Crown's right to the royal mines in question is a corporeal hereditament, that it has not been granted in fee, and that consequently it falls within the designation of Crown lands in *The Goldfields Act*. The defendant maintains, on the other hand, that the context of the Act requires a more limited meaning to be given to the words. It is necessary, therefore, to examine carefully the provisions of the Act, and to compare it with other legislation *in pari materia*. The powers of the Crown, as represented by a colonial Government, to deal with public lands and mines can only be exercised in accordance with the express provisions of an Act of the Legislature (*Constitution Act*, 31 Vic., No. 38, s. 40). The legislature has accordingly from time to time passed statutes providing for dealing with Crown lands and the mines and minerals under them. The first Acts dealing with gold mines, which were passed shortly after the discovery of gold in New South Wales (16 Vic., No. 43, and 17 Vic., No. 23), recognise the prerogative right of the Crown to gold in the land of subjects, and also recognise the right of the subject to protection in the possession of the land. The distinction between waste lands of the Crown and private land is clearly drawn. The same distinction is recognised in the Act, 20 Vic., No. 29, which repealed these Acts, and was in force when Queensland was created a separate colony. That Act sanctioned the issue of miners' rights, which authorised the holders to mine for

gold upon the waste lands of the Crown (ss. 3 and 4). It also authorised the Governor-in-Council, in accordance with the general laws affecting such waste lands, to grant leases of auriferous lands for mining purposes (section 6). It further imposed a penalty for mining for gold on land belonging to a private individual without his consent (sec. 9). *The Crown Lands Alienation Act of 1868* dealt with the whole subject of the alienation of Crown lands in Queensland. That Act, which declared that nothing in it should alter or repeal the Act (20 Vic., No. 29), and was therefore intended to be read with it as part of a code dealing with Crown lands, contains a definition of the term "Crown lands," which is, so far as it is relevant to the question now under consideration, identical with that in *The Goldfields Act of 1874*. *The Pastoral Leases Act of 1869* contains a definition of Crown lands in practically identical terms so far as refers to land granted in fee. *The Act of 1868* was repealed by *The Crown Lands Alienation Act of 1876*, the Goldfields Act having been passed in the meantime and by the same Parliament. The definition of Crown lands in *The Act of 1876* is—"all lands vested in Her Majesty which are not dedicated to public purposes, and which are not for the time being subject to any deed of grant, lease, promise, or engagement made by or on behalf of Her Majesty, and all lands comprised in pastoral leases which are by law subject for the time being to reservation, selection, or alienation." *The Act of 1876* was in turn repealed by *The Crown Lands Act of 1884*, in which Act the term "Crown lands" is defined to mean so far as is material for the present case "all lands vested in Her Majesty which are not for the time being dedicated to any public purpose or subject to any deed of grant, lease, contract, promise, or engagement made by or on behalf of Her Majesty." I think there is no room for doubt as to the meaning of the term "Crown lands" in any of these Acts. The term is used as a term of qualification or description to distinguish land with respect to which the Crown had parted with all or some of its rights from land over which it retained full

power of disposition. And the mode adopted for distinguishing between the two classes of land was to ascertain whether the Crown had entered into a contract for the alienation of the whole or a part of its interest in the land considered as a portion of the earth. Such contracts would be recorded in the proper office, and afforded an easy and certain mode of distinguishing Crown land from other land. There is no suggestion anywhere of a distinction between land and mines lying under it, or of the possibility of the Crown having granted land with a reservation of a stratum of the soil lying below the surface. The basis of the definition is in each case a reference to Acts which are ordinarily, if not always, done with the object of affecting the title to the surface. I am of opinion that the same construction must be applied to the definition of the same term in *The Goldfields Act*, many of the provisions of which are not limited to goldfields. Other arguments were used on behalf of the defendant, all tending to the same conclusion. It was pointed out that the exception of land leased for pastoral purposes only, from the negative words of the definition, would be idle, if royal mines, or, indeed, any subjacent stratum of soil, would otherwise be included in the definition of Crown lands. Such mines or strata obviously could not be leased for purely pastoral purposes. Again, the rights to which the holder of a miner's right is entitled, as enumerated in section 9, contemplate a possession of the surface. Section 10, which authorises the grant of mining leases, expressly authorises the grant of a lease of Crown land, "although occupied for business purposes" by the holder of a miner's right, but not without the consent of such holder. As the occupier of land for business purposes is only entitled to occupy the surface, the prohibition of a lease of a mine perhaps hundreds of feet below the surface without his consent would seem to be meaningless. Section 11 authorises the grant of a mining lease of land occupied for the purpose of residence or business, on condition of making compensation for any buildings or other improvements on the land, a

provision which would be absurd in the case supposed. All these arguments point to the conclusion that the question whether any land is open to occupation under a miner's right, or can be the subject of a lease, depends upon the actual state of the title to the surface, and that if the surface has been granted in fee, neither it nor any subjacent stratum is Crown land within the meaning of the Act. In short, the Act appears to use the term Crown lands to designate a subject of which one attribute is possession of the surface, in clear contradistinction to mines of which an essential attribute is working below the surface. The Victorian decisions of *R. v. Davies* (*ubi supra*) and *Shamrook Gold Mining Company v. Farnsworth* (2 Vic. L.R., Eq., 165) are to the same effect. The definition of Crown lands in the mining statute under consideration in those cases was "all lands which are not private property." And it was held that this did not include gold mines lying under land which had been granted in fee. I am of opinion, therefore, that even if the locus in question was excepted from the grant in fee, and remained in the formal possession of the Crown, it was not Crown lands within *The Goldfields Act*. The plaintiff has consequently, in my opinion, no colour of right to maintain this action, and judgment must be given for the defendant.

HARDING, J.: In order to answer the question submitted in this case it is first necessary to ascertain what is a royal mine of gold. I have already decided this in the case of *Plant v. the Attorney-General* (5 Q.L.J., 57). That case decided—and after further consideration I am of opinion for the reasons I gave in the judgment—that a "royal mine of gold" is and comprises not only the actual gold but the stratum in which the gold is contained. In that case I further decided—and I now continue of the same opinion—that such royal mines in this colony do not pass under a grant by the Crown of the land. What passes is the land down to the royal mine and below it. The grantee has no right to the royal mine at all. When a grantee takes possession of the land under a grant from the Crown all the possession

that he has is of the land—not of the royal mine, in possession of which the Crown remains as though no grant had been made. This is well illustrated by the following quotation from *Cruise's Dig.*, vol. 1, title 1, sec. 1, para. 2, "Real Property":—"Land legally includes all castles, houses, and other buildings standing thereon; and downwards whatever is in a direct line between the surface and the centre of the earth, such as mines of metals, coals, and all other fossils, which belong to the owner of the surface, except mines of gold and silver, for these by the royal prerogative belong to the Crown." As incident to its right to the royal mines, the Crown has full liberty to dig and carry away the contents of the royal mine with all other such incidents thereto as are necessary to be used for getting them (*the Case of Mines*, 1 Plowden, 310, 336). The Crown has further the power of granting a royal mine to a subject. I adopt the language of Lord Watson in the judgment of the Judicial Committee of the Privy Council in the *Attorney-General of British Columbia v. Attorney-General of Canada*, where he says:—"According to the law of England, gold and silver mines, until they have been aptly severed from the title of the Crown and vested in a subject, are not regarded as *partes soli* or as incidents of the soil in which they are found. Not only so, but the right of the Crown to land and the baser metals which it contains stands upon a different title from that to which its right to the precious metals must be ascribed." A royal mine, therefore, appears to be in the soil, but not of the soil, nor incident to it. The title to it is by royal prerogative, and stands upon a different footing from that of the Crown's right to the land. With respect to the land within which as a physical fact it is, it is as though it did not exist there. Next as to *The Acts Shortening Act of 1867*, which enacts, section 11—"That in all Acts the word 'land' shall include messuages, tenements, and hereditaments, corporeal or incorporeal of any tenure of description and whatever may be the estate or interest therein unless where there are words to exclude houses and buildings or to

restrict the meaning to tenements of some particular tenure or to some particular estate or interest." This enactment contains nothing which extends the meaning of the word "land" so as to include royal mines unless it does so by the law independently of the Act, which I have already found it does not. As pointed out in *Plant v. the Attorney-General* and numerous other decisions of this Court, the estate of the Crown in this colony can only be disposed of to the subject in the mode authorised by Acts of its legislature. I know of no legislative authority to deal with royal mines existing in this colony, except it can be found in *The Goldfields Act of 1874*, with respect to which this Court has in the case of *Hall v. Gorrie* (8 Q.L.J., 118, at p. 118) declared "that its clear and obvious policy is the obtaining of the gold existing in the Crown lands of the colony from such lands." Bearing this in mind, and further, that section 4 of that Act enacts that "nothing in this Act contained except so far as is herein expressly enacted shall be deemed to abridge or control the prerogative rights and powers of her Majesty in respect of 'gold mines.'" I proceed to consider how the Act itself enables the subject to acquire thereunder gold (i.e., the royal mines) in the lands of the colony and in what lands. A survey of sections 6-16 elucidates the matter. It authorises the possession and occupation of Crown lands for mining purposes by the holder of a miner's right, and in consequence of his taking up and occupation thereof it deems him to be possessed of such lands and the property therein, and it makes all the gold in the lands his absolute property, he being in lawful occupation of the land so taken up and occupied. Now if the gold (i.e., royal mine) is part of the land, as soon as the Act gave the miner the property therein he would have had the gold, but the Act goes on to give him the gold also, an entirely unnecessary provision did the gold pass with the land; consequently I think the Act on its face deals with two different things, the land and the gold in it. With regard to the land which it allows to be taken up and occupied, it cannot be

contended for one moment that it is land other than land belonging to the Crown and not to the subject, inasmuch as the Act would, if this were otherwise, be infringing on the right of the subject's property without compensation, whereas using the other construction it does no injustice. Of necessity, therefore, the only gold which the Act allows to be the property of the holder of the miner's right is the gold found in such land, the land and gold at the time of the taking up belonging to the Crown and not to the subject. This being the machinery of the Act, it follows that the gold to which the miner is entitled by virtue of his miner's right is only such gold as he may find in land which he can take up and search for gold in—that is unalienated land. Turning now to the interpretation clause, section 2, the meaning of "Crown lands" is thus defined—"All lands vested in Her Majesty which have not been dedicated to any public purpose, or which have not been granted in fee, or lawfully contracted to be so granted, or which are not under lease for purposes other than pastoral purposes." If this means that land includes "royal mines" this position arises, and it will be found that the Act after it has vested the property in the land in the miner goes on to give him the gold in it—which has passed and become his property. Thus the Act would enact an unnecessary absurdity. Thus the Act by internal evidence shows that royal mines are not within the definition of Crown lands. Outside the Act I have shown they are not. The question must be answered in the negative.

REAL, J. (after reciting the facts and reading sec. 14 of *The Goldfields Act of 1874*) said: The plaintiff contends that the words "Crown lands" in sec. 10 of that Act authorise the Governor to grant to him a lease of the Crown's prerogative right to gold and gold mines in the lands of a subject. "Right" was judicially declared in the *Queen v. The Earl of Northumberland*, 1 Plow., 310. A grant by the Crown of lands did not carry with it a right to gold and silver in royal mines within the metes and bounds of the lands granted. In this judgment the words in the

lands of the Queen or of subjects are used in contradistinction as in fact describing different parcels. The prerogative right to gold and silver and all royal mines can now be disposed of in the manner provided by sec. 40 of *The Constitution Act*. The entire management and control of the waste lands belonging to the Crown in the colony of Queensland, and also the appropriation of the gross proceeds of the sales of such lands and all other proceeds and revenues of the same from whatever source arising within the said colony, including all royalties, mines and minerals, shall be vested in the legislature of the said colony. I see therein no reason why the legislature may not make provision for disposing of such gold and silver and royal mines as may be in the lands and soil of the Queen without in any way providing for the disposal of gold and silver and royal mines in the lands and soil of the subject. But the argument for the plaintiff is that by the use of the words "Crown lands" the legislature has made provision for disposing of the prerogative right to the gold and royal mines of gold in the land of subjects. In *re Metropolitan District Railway Co.*, 13 Ch.D., 612, Fry, J., says—"Land in the ordinary meaning must be that in respect of which you have the right from the centre of the earth to the heaven above," and in the *Case of Mines*, the words "lands of the Queen" are used as indicating land to which the Crown had such right from the centre of the earth to the heaven above, all other lands being therein designated lands of the subject. Lands of the Queen and Crown lands are to my mind convertible terms and must be taken to mean the same thing. The prerogative right to mines of gold in the lands of the subject has been expressly held in Victoria not to be within their gold mining Act which uses the words "waste lands of the Crown." *R. v. Davies*, 6 W.W. & A.B., 246; *Shamrock Co. v. Farnsworth*, 2 V.L.R., 165. In *Shamrock Co. v. Farnsworth*, Molesworth, J., uses the words Crown lands in the same sense. He says—"I think that the license under which the plaintiffs claim is confined to Crown lands, that is, to lands which are not private property.

I do not think for the present purpose, the statute authorises the Crown to dispose of the mines under lands which have been alienated." Such is the definition given by Molesworth, J., to the very words used in sec. 10 of our Act. Such as I have already said appears to me to be the natural sense of the words. It is consistent with the use of similar words in the *Mines Case*, and with the ordinary meaning of the word land as given by Fry, J. What then are we to hold extends the meaning of the words "Crown lands," so as to authorise by their use the disposal of or dealing with the prerogative right of the Crown to gold and royal mines of gold in the lands of a subject? The words "Crown lands" are defined in sec. 2 of our *Goldfields Act of 1874*. That definition seems inconsistent with the words "Crown lands" being used in any sense other than as a description of lands to which the Crown has that exclusive title spoken of by Fry, J., except where subject only to pastoral leases. All through the Act the words are used in a sense to my mind consistent and *prima facie* consistent only with that interpretation. (See sec. 2—definition of "claim" "mine," sec. 9 as to rights given to holders of miners' rights, and see also secs. 24 and 26.) So much for the Act itself, and looking then to the Acts on the same subject passed before and since *The Goldfields Act of 1874* we see in what sense the words were previously used and how they have been since understood by the colonial legislature. These Acts begin with 16 Vic., No. 43, and end with *The Mineral Land (Sales) Act of 1892*. 16 Vic., No. 43, the first of the colonial gold mining statutes dealt with the gold and gold mines in all lands, as well that of the subject as of the Crown, so also did 17 Vic., No. 23. But in no part of these statutes were the words "Crown lands" used to designate any interest in gold or in gold mines situate in or under the lands and soil of the subject or other than in contradistinction to lands of the subject and indicating the lands to which the Crown had a title from the surface to the centre of the earth. (See secs. 2 to 7 inclusive of 16 Vic., No. 43, and sec. 3 of 17 Vic.,

No. 23; secs. 4 to 9 of 20 Vic., No. 29, which repealed the former Acts. Sec. 4 authorises mining under a miner's right on all waste Crown lands. Sec. 9 imposes a penalty on persons mining in private lands.) Equally do the subsequent Acts of our legislature tell against the plaintiff's contention. (See title and preamble of *The Act of 1886*.) This title and preamble show the legislature considered that the title to the surface of any such lands was such as would not bring that part within the definition of Crown lands in sec 2 of *The Act of 1874*, the effect of which was the exclusion of all parts situate thereunder from that definition. (See also secs. 3 and 4 of *Act of 1886*.) And see *The Mineral Lands (Sales) Act of 1892*, the full title of which is—*An Act to provide for mining for gold and silver on lands within goldfields and mineral districts that may hereafter be alienated*—a title certainly not consistent with the contention that such mining had already been provided for as to gold by *The Act of 1874*. For the reasons given, I have come to the conclusion that the words "Crown lands" in *The Goldfields Act of 1874* mean such lands as are exclusively vested in Her Majesty or subject only to a pastoral lease. I therefore think that whatever may be the nature of the prerogative right to royal mines in the lands and soil of the subject, even if it be in the nature of a reservation of the whole gold-bearing strata absolutely excluding the freeholder from the possession of royal mines in or under his land as fully as it does from the property therein, yet that prerogative right cannot be made the subject matter of a lease under *The Goldfields Act of 1874*. But the plaintiff having made the decision in the case of *Plant v. Attorney-General*, which decides the prerogative right does so exclude the freeholder, the foundation of his whole argument and the important bearing which a correct answer to that question may have on this case, as appears by the judgment of my brother judges, I think it proper to express my opinion thereon and the reasons therefor, more especially as it is a question materially affecting the rights of the defendants

other than Rollston. The plaintiff's counsel at the opening of his argument intimated his intention so to amend the case as to show the plaintiff had the two titles—that of owner of the land in question and the application for a lease upon which latter alone his title now rests, the other title being in the defendants other than Rollston. The extent as judicially declared in the *Case of Mines*, already cited, is—That by the law all mines of gold and silver within the realm, whether they be in the lands of the Queen or of subjects, belong to the Queen with liberty to dig and carry away the ores thereof with such other incidents thereto as are necessary to be used for getting the ore. This gives to the prerogative right a much wider right of entry and search than would be given by a mere reservation in a deed of grant from subject to subject, as to the effect of which see *Ramsay v. Blair*, 1 App., Ca. 701. The Crown's prerogative right to enter, search, and dig the gold itself is in the *Case of Mines* claimed over all land within the realm and is in no way limited by the way in which any part of it may have been granted. It seems to me the case in effect decides that the right of the Crown to search for gold in lands of A. may be exercised through the lands of B. if thereby it could be more efficiently and inexpensively done. Could it be said that the Crown having worked a mine in the lands of B., and taken all the gold and silver and all the gold-bearing strata thereout, would not by prerogative right be entitled to use the way so made to obtain more easily and expeditiously the gold within adjoining land? Yet this is the decision in the case of *Ramsay v. Blair* with respect to the implied right to enter on a reservation between subject and subject. Such a contention, when you look at the claim made, and the decisions in the *Case of Mines*, does not seem reasonable, and less so when you look at the reasons given for the decision. I am therefore of opinion that the nature and extent of the Crown's prerogative right is not to be ascertained by comparing it with an express reservation of certain strata in a conveyance between subject and subject. The sufficiency of the reasons given

for the decision in the *Case of Mines* we are not now at liberty to question. We have to ascertain the nature and extent of the right which is claimed, and how far it excludes other rights and interests. The purposes for which it was claimed, and the manner and circumstances under which it was enforced, may, I think, be considered as a right founded on usage, and, unless expressly so declared by some judicial authority, will not be taken to extend further, or to exclude the interests of others in any greater degree than necessary for the due and efficient enforcement of the objects for which the usage has been established, or is alleged to have arisen. The grounds of the Crown's claim are stated to be—(1) The excellency of the thing; (2) the necessity of the thing; (3) convenience to the subject in the way of mutual commerce and traffic. What is there in these grounds of claim to the enforcement of which a construction is necessary that would take the right of possession out of the subject except as against the Crown? That the Crown's prerogative right to enter, search, and dig in the soil of the subject is founded on precisely the same title of usage, is evidenced by the same Acts of authority. The Crown's right to the gold is, as I have pointed out, more extensive than would be implied in a reservation between subjects, and necessarily so, from the nature of the reasons upon which that right is founded. And why should the two rights not be considered and measured by the same rule? Why should one be held to exclude the right of subjects to a greater degree than necessary to give full effect to the right in favor of the Crown? Looking at the manner in which the Crown's right before the *Case of Mines* had been enforced, we find that in most of the charters cited in that case the Crown granted the license, either subject to the consent of the landowner, or subject to a payment by the licensee of a sum to the landowner. It is true that such provision in favor of the land-holder was, and was expressly decided to be, a mere matter of grace by the Crown. But how could the subject who owned the lands enforce the pay-

ment of the sum which by grace of the Crown, the Crown licensee is directed to pay to him? If he is to be taken as having possession he could for his consent claim the payment, without which the Crown did not authorize the licensee to enter, otherwise the suit for payment to the free-holder must have been brought in the name of the Crown. And if any case of that nature had been brought preceding the *Case of Mines*, such fact would, I think, have been relied on in support of the Crown's case. It would indeed be conclusive in favor of the Crown. Of course it is possible that Crown licensees always paid the owner of the land without delay or dispute, but that to my mind would equally support the view that the landowner had some simple means of enforcing payment as by refusing the right to enter or to continue search if he were unpaid. As is said in the *Case of Mines* (319) usage proves what is the law, and when dealing with a right founded on usage that principle should be applied, and that the usage as to granting licenses subject to the consent of or a payment to the land-owner, if not conclusive, at least tends to show that though the right of property was in the Crown the right of possession as against all but the Crown was in the freeholder. I find nothing in any of the cases relating to the Crown's right to gold and silver, and to enter and search and take the same, which would not have full effect if the possession were held to be in the subject against all others than the Crown with the right of property in the Crown, and all the dealings of the Crown with mines in lands of the subject are consistent with that assumption, and very difficult to explain unless upon that assumption. So little was the right of the Crown supposed at the time of that case, that we find Lord Hardwicke in 1737, nearly two centuries after the *Mines Case*, holding in the case of *Lyddall v. Weston*, 2 Atk., 20, that the Crown had no right of entry against the will of the freeholder upon an opened royal mine even where there was an express reservation. No doubt this case, or rather dictum, cannot now be relied upon as good law. At the expiration of nearly another

century, in 1810, the question again came up for decision, and that judgment was dissented from by the Master of Rolls, Sir William Grant, in *Seaman v. Vawdrey*, 16 Ves., 393. The next series of cases dealing with the rights of the Crown in the order of date cited in the argument are the Victorian cases, which with their decisions have been so fully discussed by the learned Chief Justice that I think it unnecessary to further refer to them. Summed up they amount to this—the owner of land having commenced mining in part of his land has a right to exclude strangers from mining on any other part. He becomes, as against them, by virtue of his title to the surface and his acts, entitled to the possession of the strata in which the gold is, and even if he is not mining but so intends and has done some act evidencing his intention, he has such right against a mere stranger, but of course not against the Crown. *Woolley v. Ironstone G.M. Co.*, 1 V.L.R. Eq., 237. Crown grants of land in Victoria have the same effect as English Crown grants in the same words would have, and therefore a Colonial Crown grant, including in the description all mines, will not pass royal mines. The reason given for the right of the Crown to gold and silver mines in England, apply equally to the colonies, and accordingly this prerogative right to gold extends to Victoria. The case of *Attorney-General of British Columbia v. Attorney General of Canada* (14 Ap. Ca., 295), does not appear to me to reach the question as to whether or not the freeholder can be considered as in possession and subject to the Crown's right to exercise the royal prerogative, or is to be considered as a mere stranger to the whole strata. It only dealt with the question whether or not the prerogative right passed by the words "public lands," from the province of British Columbia to Canada. In the case of the *Attorney-General v. Morgan* (1891), 1 Ch., North, J., at p. 443, says—"It seems probable that at one time the right to all mines, even in the land of a subject, was vested in the Crown, but that in the course of years the right to get the baser metals in his lands was

conceded to the subject who owned such lands. In this concession, however, no royal mines or mines of gold and silver were included. They were and still are the exclusive property of the Crown as part of the royal prerogative." This concession as to mines other than royal mines might have easily been made to the subject, who owned such lands, if the prerogative right of the Crown thereto was of such a nature that the property in the mines being solely vested in the Crown, the possession thereof was to be considered, as against all others than the Crown, in the subject who owned the land. The mere decision of the Crown not to claim such mines as against the owner of the land would in effect constitute the concession, but if the owner is to be considered as a mere stranger it would require a grant of which there is no evidence. Morgan's title, it appears, was a lease from the owner of a farm of amongst other things gold ores subject to the rights of the Crown, and rents, royalties, and covenants therein mentioned. He refused to pay the Commissioner of Woods and Forests any royalty, hence the action. At page 454, the learned judge further says—"From the time of the Revolution the hereditary possessions of the Crown, including royal mines, have been given up to the nation. It is, however, wholly untrue that the Commissioners prevent the owner of lands from mining for gold therein, although they are undoubtedly entitled so to do if for any reason such a course should be deemed desirable." I may observe here that in no part of the case or the judgments is the propriety of the owner giving a lease such as therein mentioned commented on, and from the quotation just made, I gather that since the revolution it has been the practice for the Crown to prefer the owners of the soil in granting, if not to grant exclusively to them, the license to work mines in their own land. So much for the cases decided in England. I see nothing in them inconsistent with the possession being in the land-holder, and the property in the Crown, but everything is consistent therewith. Looking then at the Acts of the colonial legis-

ture, in whom is now vested the power to deal with the prerogative right, persons having ownership of the soil are not mere strangers to the mines, and whilst claiming and enforcing a royalty from them a distinction is made between such owners and a mere stranger, distinction is made in their favor as to the terms on which they may mine on their own lands compared with the terms upon which mining is permitted on the lands of the Crown. See Acts 16 Vic., No. 43; 17 Vic., No. 23; 20 Vic., No. 29 before cited. In the first two of these Acts the legislature seems to have chiefly in view the raising of revenue. The fee chargeable under the first Act for a miner's right is thirty shillings per month, or ten per cent. of the gross proceeds of the gold by way of royalty for mining on waste lands of the Crown. Only one-half of that royalty or license fee is demanded for mining on lands which have been alienated, 17 Vic., No. 23. The fees and royalties were lessened, but the same proportion kept. By 20 Vic., No. 29, the fee for a miner's right was reduced to the almost nominal sum of ten shillings per year. And the whole scope of the Act points to the conclusion that the chief object of the legislature was to induce persons to take up and mine such lands within the colony as were likely to be gold producing. In this Act there is no fee whatever required to entitle a man to mine on alienated land, but sec. 9 imposes a penalty on any person mining for gold on the land of a private individual without the consent of the owner. All these Acts support the view that the freeholder is not considered, and is not to be considered, a mere stranger to the royal mines within his lands, and are consistent with that view of the prerogative as to royal mines, which would give to the land-owner the possession as against all others than the Crown. To the Crown belongs the right of property in all gold and royal mines, and the right to take possession thereof, and dig and search for the same in all lands within the realm as well that of the subject as of the Crown. The case of *Attorney-General v. Plant* is in direct contradiction to this view.

The decision therein is founded on the view taken by the learned Judge of the effect of the cases therein cited. For the reasons given I have with much hesitation come to the conclusion the case of *Plant v. The Attorney-General* was wrongly decided, and that the Crown's prerogative right to unopen royal mines does not within this colony exclude the possession of the freeholder as against others than the Crown and persons claiming under the Crown.

Solicitors for plaintiff: *Marsland & Marsland*.

Solicitors for defendants: *Macdonald-Paterson & Hawthorne*.

CIVIL COURT.

GRIFFITH, C.J.

7th May, 1894.

GREAT MONKLAND TRIBUTE COMPANY v.

TRUKMAN.

Company—Call—Forfeiture of shares—Companies Act, 1863 (27 Vic., No. 4), s. 25, Table A.

The articles of association of a company contained a clause that if any member failed to pay a call within seven days he should, by mere default alone and without any proceeding on the part of the company, cease to be a shareholder. A shareholder having made such default was sued for calls due.

Held, that the shares could be forfeited only at the option of the directors, and no such option having been exercised, the shareholder remained liable.

ACTION, before Griffith, C.J., and a jury at Maryborough, to recover calls alleged to be due by the defendant.

The jury found that the calls were duly made, that due notice was given to the defendant, that the shares were never forfeited by the plaintiffs, or treated by them as forfeited. It was contended for the defendant that under the articles of association a shareholder by the non-payment of a call absolutely ceased to be a member of the company.

Power for the plaintiff. *Lilley* for defendant.

GRIFFITH, C.J., delivered judgment: The plaintiffs are a joint stock company in voluntary liquidation. This is an action to recover the amount of three calls, two made before the com

mencement of the liquidation and the third by the voluntary liquidator. The defendant relies upon article 8 of the articles of association, which is as follows:—"Should any member fail to pay his call within the space of seven days from its due date he shall, by reason of his default alone and without any previous proceeding on the part of the company or its officers, cease to be a shareholder in respect of the shares upon which default is made, and his name shall thereupon be struck out by the secretary from the share register, and his shares shall thereupon be the absolute property of the company." It was proved at the trial that before the making of any of the calls sued for a previous call had been made, which the defendant had failed to pay for seven days after its due date. It is contended on his behalf that upon the expiration of that time he absolutely ceased to be a member of the company, and that no action on the part of the company or its directors was necessary to bring about that result. The plaintiffs contended that the article must be treated as a provision for forfeiture, and that the non-payment of calls within seven days operated as a forfeiture of the shares only at the option of the directors. In answer to questions, the jury found that the plaintiff company, acting by its directors, had not forfeited the shares or treated them as forfeited. It is to be observed that article 8 does not use the word "forfeited," but appears to assume that the cessation of membership can be effected by the mere default in payment of a call. Article 10, however, describes the result as a "forfeiture." In the case of *Moore v. Rawlins* (6 C.B., N.S. 289), it was held upon the construction of a clause in a deed of settlement, which provided that if a member of a company should permit any monthly subscription on his shares to be in arrears for six months, the shares should become absolutely forfeited to the company. That the neglect to pay the subscription operated as a forfeiture of the shares only at the option of the directors. The point seems not to have been seriously disputed, *Lush, Q.C.* (afterwards *Lush, L.J.*), the defendants' counsel conceding that this

was the true interpretation. The case has been considered ever since—a period of nearly forty years—as an authority for the proposition that such clauses are inserted in articles for the benefit of the company, and that there is no forfeiture until a forfeiture is declared. (See *Lindley on Companies*, p. 533.) In this respect the same rule of construction has been applied as in the case of forfeitures for non-payment of rent or breaches of covenant, which take effect only at the option of the person for whose benefit the act not performed ought to have been performed. (*Davenport v. Regina*, 3 Ap. Ca., 115.) In the present case article 8, standing alone, would seem to indicate that the framer of it intended to exclude the application of this rule of construction. My attention was, however, drawn by Mr. Power to article 14, which allows a surrender of shares in the company on certain conditions, one of which is that the retiring member shall pay his proportion of the liabilities of the company if the directors so require. This provision, it was argued, showed that the articles, taken as a whole, did not contemplate that a member might get rid of his shares and the consequent liability upon them without any exercise of any option on the part of the directors. My attention was also directed to the cases which established that a power to forfeit is a fiduciary power to be exercised by the directors for the benefit of the company, and that an attempted forfeiture in pursuance of a scheme to enable the shareholders to escape liability is ineffectual. (*Lindley*, pp. 82, 83, 84.) To these arguments it was answered that article 8 is, in effect, a standing declaration on the part of the company of its exercise of the option to forfeit, if any such exercise is necessary, whenever a member makes default in payment of a call for seven days. And there is some ground for thinking that this was the actual intention of the framer of the article. Assuming, however, that the literal effect of article 8 is that the member upon mere non-payment of a call for seven days ceases *ipso facto* to be a member of the company, it was contended by the plaintiffs that the article so con-

strued is *ultra vires*. The effect of *The Joint Stock Companies Act, 1863*, with respect to the liability of members is thus stated by Lord Macnaghten in *Ooregum Gold Mining Company v. Roper* (1892, A.C., 145):—"The dominant and cardinal principle of these Acts is that the investor shall purchase immunity from liability beyond a certain limit on the terms that there shall be and remain a liability up to that limit. Whether this liability is one of the conditions of the memorandum within the meaning of that expression in *The Act of 1862*, as Lord Selborne seems to have thought (*Dent's Case*, L.R., 8 Ch., 768), or a condition attached to a company limited by shares and of the essence of such a company, though it may not be found contained within the four corners of the memorandum, is a matter of little or no importance. In either view of the case it is plain that the condition is one which cannot be dispensed with by anything in the articles of association, or by any resolution of the company, or by any contract between the company and outsiders who have been invited to become members of the company, and who do come in on the faith of such a contract." I adopt this as a concise statement of the law, and I think it follows that an article the effect of which would be that a member by merely making default in payment of a call for seven days could absolutely discharge himself from all liability for future calls (except his liability as a past member in the event of the company being wound up within twelve months), would be *ultra vires*. It was contended by Mr. Lilley that the law as stated by Lord Macnaghten does not apply to the case of forfeiture of shares, which, as pointed out in *Trevor v. Whitworth* (12 Ap. Ca., 409), is recognised by the Act itself. (Section 25, table A, articles 17 to 22.) It is to be observed, however, that the forfeiture referred to in table A is a forfeiture by exercise of the option of the directors. And the forfeiture spoken of in *Trevor v. Whitworth* is described by Lord Watson (p. 429) as a proceeding *in invitum*. I am of opinion that there is an essential distinction between a forfeiture of this

kind and an attempted relinquishment of liability by a member of his own motion without any exercise of volition on the part of the directors, which I think is inaccurately described as a forfeiture. The substance of the matter must be considered rather than the form, and an attempt to exclude the exercise of volition by the directors, and to leave the cessation or continuance of a member's liability in the hands of the member himself, carries the matter no further. For these reasons I think that article 8, if read literally, is *ultra vires* and imperative. If, however, the article is to be read as authorising a forfeiture at the option of the directors, which, having regard to the length of time that has elapsed since the case of *Moore v. Rawlins*, and the numerous articles of association that must have been framed in reliance on the law as declared in that case, I am disposed to think should be taken to be the true construction, that option has not been exercised. In either view, therefore, the forfeiture set up has not taken place, and the defendant is still a member of the company. It was further contended by Mr. Lilley that even if article 8, taken literally, is *ultra vires*, so that the defendant remains liable to be treated as a member of the company as between himself and the company's creditors, still the company itself cannot, nor can a voluntary liquidator who is the nominee of the members, take advantage of the invalidity. No authority was cited to show that the rights of a voluntary liquidator are different from those of an official liquidator, or that the obligations of a member are different in a voluntary liquidation from his obligations in a compulsory liquidation. Nor do I know of any authority for the distinction. It was suggested by Lord Herschell, in the *Ooregum Company's Case*, which was a case of shares issued at a discount, that possibly the holder of such shares might be entitled to insist that no calls should be made upon him beyond the agreed amount, except for the purpose of paying debts and costs in a winding up. But there is not, so far as I am aware, any authority on the subject. And it seems to me that the point is not open in

the present case in its present stage. Possibly, if the defendant could show that the calls now sued for are not required for the payment of the debts of the company, he might be entitled to apply for a stay of proceedings or some similar relief. On that I offer no opinion. The question now before me is who is entitled to judgment on the findings of the jury and the admitted facts. The jury found against the plaintiffs with respect to one of the calls. For the reasons I have given, I am of opinion that the plaintiffs are entitled to judgment with respect to the other two calls. There will therefore be judgment for the plaintiffs for £138 17s. 1d. Costs will follow in the usual course. Leave to apply.

Solicitors for plaintiffs: *Chambers, Bruce & McNab*.

Solicitors for defendant: *Bornays & Osborne*.

TOWNSVILLE.

GRIFFITH, C.J.

8th June, 1894.

In re SHIELDS AND BECKETT, Ex parte R. T.

SHIELDS.

Insolvency Act of 1874 (38 Vic., No. 5), ss. 90, 202, rr. 202, 203, 209, 227, 229, 234, 241—

Liquidation—Proof of debt—Powers of Registrar—Appointment of trustee.

The Registrar has power to enquire into and reject a proof of debt in liquidation proceedings.

The functions of the Registrar with respect to objections to the admission of proofs of debt in a resolution for liquidation are the same in Queensland as under *The English Bankruptcy Act of 1869*, unless a contrary intention is expressed under other rules inconsistent therewith.

The appointment of a trustee in liquidation by arrangement at the first meeting need not be by a special resolution.

APPEAL from the decision of the Registrar of the Northern Supreme Court, rejecting a proof of debt by Rhoda Shields in liquidation proceedings, and from a refusal to register J. S. Miller as trustee.

The facts appear in the judgment.

GRIFFITH, C.J.: At the general meeting, held under the petition for liquidation, proofs of debts

were produced for sums amounting in all to upwards of £900, one of which was a proof by Mrs. Rhoda Shields, the wife of the debtor Shields, for £264, being the unpaid balance of a sum of £279 alleged to have been advanced to the debtors on the 1st of May, 1891. This proof was objected to by a creditor, on the ground that the advance was made to the debtor Shields alone, and not to the firm. A resolution for the liquidation of the affairs of the debtors by arrangement, and not in insolvency, was passed unanimously. A resolution was then proposed for the appointment of Mr. J. S. Miller as trustee. This resolution was supported by creditors for £465, including Mrs. Shields, and opposed by creditors for £418. If, therefore, the trustee must be appointed by a special resolution, *i.e.*, a resolution decided by a majority in number and three-fourths in value of the creditors present and voting, this resolution was not duly carried, even reckoning Mrs. Shields' proof. And if her proof were disallowed, the resolution would not have been carried as an ordinary resolution, *i.e.*, a resolution decided by a majority in value of the creditors. When the resolutions were presented to the Registrar for registration he required Mrs. Shields and the creditors objecting to her proof to attend before him. They accordingly attended by their proxies, and the Registrar, after hearing them, rejected the proof, and refused to register the resolution appointing Miller as trustee. A subsequent meeting of creditors was then held, under rule 211, on the assumption that no trustee had been appointed at the first meeting. At the second meeting, a resolution appointing Miller trustee was assented to by creditors for £460 out of a total of £883, the majority including Mrs. Shields. Another resolution was proposed and assented to by creditors for £422 out of a total of £619 (not including Mrs. Shields' proof), appointing Mr. Lynch as trustee. The Registrar has not registered either of these resolutions. Mrs. Shields now appeals from the rejection of her proof and the refusal of the Registrar to register the resolution appointing Miller as trustee, and the

creditor who nominated Mr. Lynch asks that the resolution appointing him may be registered. Upon these facts three questions arise for decision—(1) whether the Registrar had power to reject Mrs. Shields' proof? (2) whether, if he had power to do so, his decision rejecting it was right? and (3), whether a trustee in a liquidation can be appointed by an ordinary resolution, or by a special resolution only? The system of liquidation established by *The Insolvency Act of 1874* is founded on that established under *The English Bankruptcy Act of 1869*, and follows that system almost implicitly so far as regards procedure. The law of insolvency, however, as declared by these two Acts, differs in many important points, and the practice under an adjudication of insolvency also differs materially. It is only necessary to refer to the differences so far as regards the first meeting, and the proof of debts for the purposes of that meeting. Under both Acts the first meeting of creditors is to be presided over by the Registrar unless he is unable to attend. Under the English practice a creditor might prove his debt at the meeting, or at any time before it, by sending his proof to the Registrar (r. 67), and the Registrar, who was also trustee until a trustee was elected (s. 17), had power "upon sufficient cause shown" to disallow any proof to which objection might be taken at the meeting (r. 70). Under the Queensland Act, a creditor desiring to vote at the first meeting must make a preliminary proof of his debt. This proof must be made before the Registrar or other prescribed person, and upon its being made "to his satisfaction" the claimant may obtain a certificate (s. 90), which entitles him to vote at the first meeting as a creditor for the amount stated in the certificate. Under the Queensland practice, therefore, in the case of proceedings under an adjudication, the Registrar's powers, with respect to proofs made for the purposes of the first meeting, are much more limited than those of the Registrar under the English practice, and in the case of a creditor who has obtained a certificate of preliminary proof he appears to have no power at all of dis-

allowance. I turn now to the practice in liquidation proceedings, which, as I have already said, is practically identical under the two systems. The chairman of the first meeting is in this case not to be the Registrar, but is to be elected by a majority of the persons present claiming to be or to represent creditors (E.R. 268, Q.R. 202). With respect to proof of debts for the purposes of the meeting, the English rule 269 and Queensland rule 203 provide, in identical terms, that "creditors may prove their debts and appoint proxies as in insolvency." But although these words are identical, their effect is different under the two systems, inasmuch as they refer to and adopt the differing modes of procedure to which I have already adverted. With respect to the powers of the Registrar in regard to proofs, E.R. 271 provides as follows:—"All proofs and proxies intended to be used at any general meeting, and not previously filed, shall be handed to the chairman of the meeting. Any objection thereto shall be marked thereon by the chairman, and shall be dealt with by the Registrar on the resolution being presented to him for registration." There is, I think, little difficulty in interpreting this rule as it stood in the English code of procedure under *The Act of 1869*. The Registrar, not being present at the first meeting, and not being able therefore at that meeting to exercise the authority given to him by r. 70 in cases of bankruptcy to disallow a proof "upon sufficient cause shown," the same power was in effect conferred on him by requiring him to deal with the objections to proofs when the resolutions were presented to him for registration. I think it was intended that the Registrar in the exercise of his authority under this rule should act upon the same principles as when dealing with proofs for the purpose of a first meeting of creditors in bankruptcy. The only rule formally controlling his power in this respect was rule 300, corresponding in words with r. 234 of the Queensland rules, which forbade him to reject or refuse a proof of debt by reason of mere informalities. This view is confirmed by the English rule 295, which required the Registrar on presentation of

the resolution to examine it, and "to hear any creditor who had given notice of his desire to be heard on the matter." The rule goes on to say that the Registrar, "on being satisfied that the requirements of the statute and the rules have been complied with, shall register the resolutions." I think that this rule shows clearly that it was intended that the duties of the Registrar before registering a resolution should not be merely ministerial, but that he should have authority to inquire into and decide all such matters as it might be necessary to decide, in order to ascertain whether the requirements of the Act and of the rules had been complied with. That the power of rejecting proofs was exercised when the proof was bad in point of law is shown by *Ex parte Ruffle* (L.R. 8 Ch. 997), and other cases. And, having regard to the serious consequences that might follow from the carrying of resolutions by the vote of persons who are not really creditors, there is strong reason why it should be exercised also where the validity of the proof depended on a question of fact. See *Ex parte Weil* (5 Ch.D., 345), in which case the power of the Registrar to inquire into the facts is assumed. The Queensland rules 205 and 229 are in terms identical with English rules 271 and 295; and I am of opinion, on consideration, although at first I felt some doubt, that it was intended that the functions of the Registrar with respect to objections to proofs in the case of a resolution for liquidation should be the same in Queensland under *The Act of 1874* as in England under *The Act of 1869*, except so far as a contrary intention is expressed by other rules inconsistent with the exercise of such a power in any particular case. In the present case no certificate of preliminary proof was produced by Mrs. Shields, so that it is unnecessary to consider what would be the effect of such a certificate in a case of liquidation, and I do not find any other provision in any of the rules limiting the power of the Registrar in dealing with objections. I am therefore of opinion that the Registrar had power to disallow Mrs. Shields' proof if the facts as established before him on

hearing the parties required him to do so. I pass to the question whether his decision was a correct one. The Registrar disallowed the proof on the grounds (1) that the books of the debtor's firm, which were produced to him, and the deed of partnership between the parties, showed that the debt was the separate debt of the debtor Shields and not of the firm, and (2) that, as under *The Married Women's Property Act, 1890* (s. 5), a married woman cannot come into competition with her husband's creditors for the purpose of dividends, she cannot be allowed to vote in the choice of a trustee. I should be disposed to agree with the Registrar on the latter point if the question were between the wife and her husband's separate creditors. And much may be said in favour of applying the same rule to the case of a claim against her husband and another jointly. It has, however, been decided by Cave, J. (*Re Tuff*, 19 Q.B.D., 88), that the 5th section of *The Married Women's Property Act* does not apply to proofs by a wife against the estate of a partnership of which her husband is a member. Without expressing any opinion of my own on the point, I should be disposed to follow that case, and overrule the objection taken to the proof on this ground. Upon the other point, the facts, as they were brought before the Registrar, were, shortly, these: The claim, which was good on the face of it, was for the balance of an advance of £279 alleged to have been made to the debtors on 1st May, 1891. The deed of partnership between the debtors, which is dated 7th May, 1891, recites that they had lately purchased a business for the sum of £300, which was to be contributed by them in equal shares, but that the whole sum had in fact been provided by Shields, who was to receive half of it from Beckett, with interest at 10 per cent., in the manner specified in the deed. The deed then provides that they shall be partners in the business for a term of 5 years from the 1st of May, and that their capital shall be "the sum of £300," and such further sums as may afterwards be contributed by them in equal shares. The firm's ledger contains no entry of any advance

from, or transaction with, Mrs. Shields, but contains entries showing Shields' account with the firm. In this account he appears as a creditor of the firm as of the date 1st May, 1891 (the same day on which the advance of £279 referred to in the proof is said to have been made), for two sums of £200 and £79, both described as "cash." The books do not show how the £21 requisite to make up the purchase money of £300 was paid. Under the date 31st August in the same year, the amount of £279 is transferred to a separate account called "W. Shields' advance account," which is credited in April, 1894, with the £15 for which Mrs. Shields gives credit in her proof as of about the same date. The debtor Beckett said that the advance was made to the firm by Shields, and not by his wife. Upon these facts the Registrar was of opinion that the debt was in fact the separate debt of Shields, and not the debt of the firm. There can be no doubt as to the identity of the sum of £279 alleged to have been advanced by Mrs. Shields and the £279 entered in the firm's books. Nor is there any doubt upon the facts as stated, that the advance was treated as between the debtors as an advance made to the firm by Shields and not by his wife. The mere omission of a debt from a debtor's books is not of itself sufficient reason for the rejecting of a proof by a trustee, if there is no reasonable ground for doubting the truth of the affidavit of proof. I am of opinion, however, that if a proof of debt were sent to a trustee in insolvency, and upon enquiry the facts appeared to be such as appear in the present case, his duty would be to reject it. Possibly, as has been suggested in some cases, a more lenient rule may be properly applied in dealing with proofs put in for the purpose of a first meeting than in the case of a final adjudication upon a claim, but I think that in this case the Registrar came to the right conclusion on the facts as proved to him. This will not of course prevent the proof from being tendered afresh to the trustee, or debar Mrs. Shields from appealing from his decision if he rejects it. Unless, however, a strong case is made upon additional

evidence, I do not think that she would succeed on such an appeal. It follows that, in my opinion, the Registrar was right in rejecting the proof, and in refusing to register the resolution appointing Miller as trustee. There having been no valid election of a trustee at the first meeting, the subsequent meeting was properly held. The resolution passed at that meeting appointing Miller had not, without Mrs. Shields' vote, the support of a majority of creditors. The resolution appointing Lynch was assented to by such a majority, but not by a majority in number representing three-fourths in value. It is necessary, therefore, to consider whether a resolution appointing a trustee in liquidation at the first meeting must be a special resolution. Section 202 (subsec. 1) provides that the meeting of creditors "may by special resolution declare that the affairs of the debtor are to be liquidated by arrangement and not in insolvency, and may at that or a subsequent meeting . . . appoint a trustee." On a strict grammatical construction, the words "by a special resolution" do not govern the second member of the sentence. The analogy of proceedings under an adjudication would induce the expectation that a trustee may be elected by an ordinary resolution. Rule 227 provides that whenever any resolution is required to be passed by creditors in liquidation proceedings, the majority required shall be a majority in value of the creditors present or represented at the meeting. Rule 241 provides expressly that any trustee after the first may be appointed by a majority in value of the creditors present or represented, although a trustee can only be removed by a special resolution. It may easily happen, as in this case, that creditors may be unanimous as to the desirability of a liquidation by arrangement instead of in insolvency, but that the majority necessary to pass a special resolution cannot be obtained in favor of any person as a trustee. Rule 212, which requires a special meeting to determine the security to be given by the trustee, may furnish arguments in support of either view. On the whole I think that the

reasons for holding that an ordinary resolution is sufficient for the appointment of a trustee at the first meeting preponderate. I am, therefore, of opinion that Mr. Lynch, who obtained the support of a majority in value of the creditors at the subsequent meeting, was duly appointed trustee, and is entitled to a certificate declaring him to have been so appointed.

IN CHAMBERS.

GRIFFITH, C.J. 10th August, 1894.

In re J. D. SCOTT, LIQUIDATING DEBTOR.

Practice—Insolvency Act of 1874, s. 202, subsec. 10.

Both the trustee's report and the resolution granting the debtor's discharge must be filed on an application to the Registrar for the certificate of discharge of a liquidating debtor.

SUMMONS calling upon the Registrar to shew cause why a certificate of discharge should not be granted to the debtor.

At a first meeting held after the presentation of a petition for liquidation the usual resolution for winding-up the debtor's estate in liquidation and not in insolvency was passed. At that meeting no resolution granting the debtor his discharge was passed, and a subsequent meeting was held under rule 236, at which a special resolution was passed granting such discharge. The solicitor for the debtor then applied, under sec. 202, subsec. 10, of the Act, for the Registrar's certificate of discharge, and presented the report of the trustee in liquidation. The Registrar declined to issue the certificate unless the resolution granting the discharge was filed.

Hellicar, for the debtor, submitted that, as the resolution was not passed at a first meeting, and as there was no provision in the Act or rules for the filing of resolutions in liquidation other than those passed at first meetings, there was no necessity, under sec. 202, subsec. 10, to file anything further than the trustee's report, especially as in the form of the certificate under the Act only the report is

recited as having been read on the application for the certificate.

The Registrar adhered to his previous decision.

GRIFFITH, C.J., was of opinion that the minutes of the meeting at which the discharge was granted should be produced and filed, as in the case of a special resolution passed at a first meeting, and made no order on the summons.

Solicitor: *Hellicar*.

JUNE SITTINGS OF THE FULL COURT.

BRABANT AND COMPANY v. KING.

Negligence—Navigation Act of 1876 (41 Vic., No. 3), ss. 163, 180—Port Dues Revision Act of 1882 (46 Vic., No. 12), s. 12, Sched. III. —Bailment—Explosives—Magazine—Unfitness of locality—Inevitable accident—Unprecedented flood—Knowledge of plaintiff—Contributory negligence—Volenti non fit injuria.

A quantity of explosives was stored in the Government magazine, at Eagle Farm, by B. & Co., merchants in Brisbane, in pursuance of *The Navigation Act of 1876*, for reward. There were no private magazines. In February, 1893, the Brisbane River was flooded twice, and the goods of B. & Co. were damaged. The floods were of an unprecedented nature. The second flood was higher than the first. No effort was made by the Government, in the intervening period, to remove or stack the goods higher. The goods were injured, and had to be destroyed. B. & Co. sued the Government under *The Claims Against the Government Act*. The defence was an exercise of proper care; inevitable accident through an unprecedented flood; and, that if the locality was unsuitable, that the plaintiffs knew and acquiesced therein.

The jury found: (1) That the Government did not regard its duty, and that the goods were destroyed through their negligence in not providing (a) a proper storehouse; (b) a proper locality; and (c) in not taking proper care. (2) That the loss was not occasioned by inevitable accident through an unprecedented flood. (3) That the rising of the river was not such that the Government could not, by any ability, have foreseen or guarded against it. (4) That the plaintiffs knew of the unfitness (a) of the storehouse; (b) of the locality; and with such knowledge, prior to and up to the grievance complained of, continued to deliver explosives and undertake the risks. Damages were given for the full amount claimed.

Harding, J., held the maxim, *Volenti non fit injuria*, was not applicable, and gave judgment for the plaintiffs.

Held, on appeal, by Cooper, Chubb, and Real, JJ., that this judgment must be reversed.

Cooper, J., was of opinion that the Government were not responsible, except for a tortious interference with the goods, and that the question should have been raised by demurrer.

Chubb, J., was of opinion that the effect of *The Navigation Act* and *The Port Dues Revision Act* was to make the Government, in respect of explosives, an ordinary bailee for reward, and that they were bound to take ordinary and reasonable care of the goods deposited; that there was no evidence to support the finding that the floods of 1893 could have been foreseen; that the knowledge of the plaintiffs as to the unfitness of the storehouse and locality was an answer to their claim; that there was some evidence as to negligence to take proper care; that there should be a new trial for reassessment of damages on the last ground.

Real, J., held that there was evidence to support the findings, but that the knowledge of the plaintiffs was an answer to the unfitness of the storehouse and locality; that the Government was not bound to remove the goods unless in the interests of public safety; that there was evidence as to negligence in not restacking after the first flood; and that there should be a reassessment of damages.

An order for a new trial with that object was granted.

ACTION by Brabant & Co., merchants in Brisbane, against T. M. King, nominal defendant appointed under *The Claims Against the Government Act*.

The claim was for damages for injuries to boxes of explosives injured in the floods in the Brisbane River in 1893, through the negligence of the Government in failing to provide proper storehouses and to take proper care of the explosives stored by the plaintiffs in the Government magazine at Eagle Farm, pursuant to the requisites of *The Navigation Act of 1876*.

The defence was a general traverse of the claim; that proper care had been exercised, and that the damage was caused by inevitable accident through the rapid rising of an unprecedented flood in the river, which could not have been foreseen.

Leave to amend was given, by pleading that if the storehouse was in an unsafe condition, that the plaintiffs knew of it.

From the evidence it appeared that certain cases of explosives were stored by Nobel and Company, in 1892, in the Government magazine at Eagle Farm, in accordance with the requirements of certain statutes. The plaintiffs were the duly constituted agents of the company in that behalf. There were no private magazines. The magazine in question was built in 1886. Prior to 1890, water was known to enter the magazine to the depth of four inches at high tide, and the floor had been raised one foot. A flood occurred in March, 1890, after which the platforms in the magazine were raised two feet nine inches. In February, 1893, the river was twice flooded to an unprecedented height. The second one was some inches higher than the first. During the interval, from the 5th to the 17th February, no effort was made to remove or stack the explosives higher. The goods were so injured by the water that they had to be destroyed. Brabant & Co. sued the Government for £7,684 8s. 4d., the full value of the goods.

Power and Lilley, for the plaintiffs.

Byrnes, A.G., Rutledge, and Macgregor, for the defendant.

The questions and answers of the jury were:—

1. Before January, 1893, were the plaintiffs importers into the port of Brisbane of the goods?—Yes.

2. Before the said date did plaintiffs deliver goods to Government in pursuance of statutes to be taken care of for reward?—Yes.

3. In consideration thereof did Government undertake and agree with plaintiffs to (a) properly store and take care of goods?—Yes. (b) Re-deliver to plaintiffs on request?—Yes.

4. Before said date did Nobel's Company cause to be delivered by plaintiffs the goods to Government, in pursuance of statutes, to be stored and taken care of for reward?—Yes.

5. Were plaintiffs the duly appointed agents of company in that behalf?—Yes.

6. In consideration thereof did Government undertake and agree with company to (a) properly store and take care of goods?—Yes. (b)

Re-deliver to company on order or request?—Yes.

7. Did the Government not regard its duty in that behalf?—They did not.

8. Did it not take proper care of the goods?—They did not.

9. By its negligence in not providing (a) proper storehouse, (b) a proper locality, (c) in not taking proper care, were the goods after that date destroyed?—Yes, by negligence.

10. Is the indenture of 6th December proved?—Yes.

11. If loss arose, was it caused by inevitable accident through the rapid rising to an unprecedented height of the flood?—No

12. Was such rising such that the Government could not by any amount of ability have foreseen or guarded against it?—The rising was not such that the Government could not by any ability have guarded against.

13. Was it known at all times to plaintiffs (a) that such storehouses, (b) that such locality, were unfit or improper?—Yes.

14. Did plaintiffs, with full knowledge of question 13, and of the risks attending the storage of explosives in such locality, for many years prior to and up to the grievance, continue to deliver explosives to the Government for storage by them in the said storehouse and locality?—Yes.

15. Did the plaintiffs undertake and continue to undertake such risks?—Yes.

16. Thereafter, and with full knowledge of questions 13, 14, and 15, did plaintiffs deliver the explosives to the Government for storage in its storehouse and locality?—Yes.

17. What was the value of goods destroyed?—£7,680 8s. 4d.

18. Was that the market value; if not, what was?—Yes.

19. What damage?—The full amount, £7,680 8s. 4d.

Power moved for judgment for plaintiffs for £7,680 8s. 4d.

Rutledge, on the findings to questions 13,

14, 15, and 16, moved for judgment for the defendant.

HARDING, J.: This was a case tried before a jury during several days, and at its conclusion the answers of the jury to the questions put by me were such, that if not debarred by the effect of the answers to questions 13, 14, 15, and 16, making a good plea or cause of action, judgment should be entered for the plaintiffs. The defence raised, in respect to which the jury have found the facts, was pleaded after the jury was sworn. At the time that the plea was handed in, on reading it hurriedly, I threw out a suggestion to the counsel tendering it, that it would be well if they were to consider whether it contained all that was necessary, as I had doubts of its validity, and a case was very shortly after referred to which pointed to some defect, and which, if followed up, would have led to all the recent authorities on the case. I can only presume, therefore, that the plea was deliberately sustained, and at the end of the case, although the temptation was held out, no further question on the part of the defendant was put to the jury. He would stand or fall upon his plea—that is, the State would—that if the Government did not provide fit and proper storehouses for the goods—which it is found they did not—if they did not provide fit or proper storehouses, or in a fit and proper locality, or did not properly store the same in the said storehouses, the plaintiff, with full knowledge of this unfitness and of the risks attending the storage of explosives in such storehouses and locality for many years prior and up to the happening of the grievance, continued to deliver explosives to the Government to be stored by the Government in such storehouses and locality, and undertook and continued to undertake such risk, and thereafter, with full knowledge of the aforesaid, delivered the explosives in the statement of claim mentioned to the said Government for storage in the said storehouses and locality. Now, the question resolves itself on that into two heads—(1) Did that plea without calling into its

assistance any of the other defences raised in the case answer the plaintiff's case? (2) Did it call into existence such assistance, and then, even if that were sustained so far as it goes, does it go to the whole of the plaintiff's case? Then the second point to be decided is—Is it necessary that this agreement should be pleaded to have been made freely and voluntarily? During the course of the case, and since, a number of authorities were cited. The first, I think, in order of time was that of *Woodley v. The Metropolitan District Railway Co.*, in 2 Ex.D., p. 384. Now, that case was relied upon by Mr. Rutledge very much, but I shall only mention it because it is entirely inconsistent, in my opinion, with the decisions in later cases, and as far as I can see, has lost all virtue since the case, which I shall subsequently mention, of *Smith v. Baker* before the House of Lords. The next case was a case mentioned by the Attorney-General in his argument, that of *Lax v. Mayor of Darlington*, 5 Ex.D., p. 28. He is specially referring to pp. 33, 35, 37, *dicta* more particularly of Brett and Bramwell, L.JJ. The case decided that the defendants, having received toll from the plaintiff, and having invited them to come to the market with their cattle, a duty was imposed on them to keep the market in a safe condition, and therefore an action would lie against the defendants for the loss sustained by the plaintiff. Now, that as near as possible was this case before us to-day, and the observations made by both Brett, L.J., and Bramwell, L.J., have nothing at all to do with the decision of the case. So far as I can see, there has been a difference between the leading Judges at home on this question, in which the minority has been one and sometimes two. This one or two seem on all possible occasions to have asserted themselves and their *dicta*. That case was commented on in this case of *Smith v. Baker*, which I shall refer to by and by. That was commented on in the case of *Thomas v. Quartermaine*, 18 Q.B.D., p. 685. Referring to the case of *Lax v. Corporation of Darlington*, on pp. 696, 697, Bowen, L.J., says: "The plaintiff may have a common right or an individual right at law

to find these particular premises free from danger, as in the case of lands on which a market or fair has been held, *Winch v. Conservators of the Thames*; *Lax v. Corporation of Darlington*. The defendant in such circumstances does not discard his legal obligation by merely affecting the plaintiff with knowledge of a danger, which but for a breach of duty on his own part would not exist at all. But where the danger is one incident to a perfectly lawful use of his own premises, neither contrary to statute nor common law, where the danger is visible and the risk appreciated, and where the injured person, knowing and appreciating both risk and danger voluntarily encounters them, there is, in the absence of further acts of omission or commission, no evidence of negligence on the part of the occupier at all. Knowledge is not a conclusive defence in itself. But when it is a knowledge under circumstances that leave no inference open to one—namely, that the risk has been voluntarily encountered—the defence seems to me complete." Implying, on the face of this other case, that there has been something more than knowledge wanted, that is to say, there is wanted, what is wanted in every contract—freedom—the contracting parties must be both and each free from duress. If one of them is under duress, there is no contract; consequently, so far, there should have been a statement of freedom of duress. This case of *Thomas v. Quartermaine* is elaborately dealt with in the case of *Smith v. Baker* before the House of Lords. In fact, they all are. It is one of those very long decisions which we have in the House of Lords sometimes, and the result of it was the defence arising from the maxim, *Volenti non fit injuria*, had not been affected by the *Employers Liability Act*, and therefore there was no evidence of breach of duty there. Lord Esher, M.R., at p. 689, says:—"Unless it can be made out that mere knowledge of the plaintiff of the existence of the defect is a defence to the action, we have no right to look into the findings. To my mind, it is conclusively shown that there was a defect—that is, such a condition in the works as produced a danger—

and that it was of such a nature that the master or person entrusted with the superintendence must have known of the existence of the defect. With regard to the plaintiff, there was no evidence that when he entered into the contract with his employer he knew of the state of the works, and, therefore, he cannot be said to have either expressly or impliedly contracted to run the risk. It is said, however, that he had been a very long time there, and must have known of the risk. Take it that he did. Is that, standing alone, something which prevents his recovering? I never heard the matter so put. It seems to me that sec. 2, subsec 3, of the Act shows that the Legislature did not adopt any such view, because in that clause a case is contemplated in which both the workman and his master know of the defect. The section says "that the workman has not to have the right of compensation in any case where the workman knew of the defect or negligence which caused his injury, and failed, within a reasonable time, to give, or cause to be given, information thereof to the employer, or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence." So that it is assumed that the servant may recover if he gives information, or if the master already knows. I cannot see, therefore, that the knowledge of the plaintiff absolves the defendant from any duty. It is put in the argument that the duty of the master is either to take reasonable care that there shall be no defect, or tell the servant that he does not mean to do so. To me it seems an unnatural doctrine that merely telling the servant of the defect should absolve the master from liability, and unless there is some authority that binds me to accept it, I cannot do so. Is it true to say that the mere knowledge of the servant, that the master is not going to take care that there is no defect or danger, makes the continuance of the servant at the work evidence of negligence on his part? Are there not innumerable instances

which negative this, as for instance, if the servant, in spite of the danger, does any act tending to save life or to the protection of his master's property? I protest against it being said that a jury are bound to find that there is negligence, in such a case, on the part of the man who runs the risk. The knowledge of the plaintiff of the want of care of the defendant is not conclusive against the former, though it is a material fact for the consideration of the jury in determining whether under all the circumstances the plaintiff was guilty of contributory negligence." Then there was *Yarmouth v. France*, in 19 Q.B.D., p. 647. It was there held by the majority of the court (Lord Esher, M.R., and Lopes, L.J., dissenting), that upon the facts the jury might find the defendant to be liable, for there was evidence of negligence on the part of his foreman, and the circumstances did not conclusively show that the risk was voluntarily incurred by the plaintiff. Then, at p. 657, Lord Esher says: "Taking the whole of that judgment together, it seems to me to amount to this, that mere knowledge of the danger will not do: there must be an assent on the part of the workman to accept the risk, with a full appreciation of its extent, to bring the workman within the maxim, *Volenti non fit injuria*." Then there is *Thruswell v. Handyside & Co.* 20 Q.B.D., 359, where it was held, that the case was rightly left to the jury; that, although the plaintiff was aware of the danger, yet he was compelled by the orders of his employer to work where he was working when the accident happened; the maxim, *Volenti non fit injuria*, did not apply, and he was entitled to recover. The next case was that which was cited during the trial, the case of *Osborne v. L.N.W.R.Co.*, 21 Q.B.D., 220. The marginal note is as follows:—The plaintiff was injured by falling on steps leading to the defendants' railway station, which the defendants had allowed to be slippery and dangerous. There was no contributory negligence on the part of the plaintiff, but there were other steps which he could have used, and he admitted that he knew that the steps were

dangerous, and went down, carefully holding the handrail. *Held*: that the defendants had not shown that the plaintiff with a full knowledge of the danger and the extent of danger had voluntarily agreed to incur it, so as to make the maxim, *Volenti non fit injuria*, applicable, and, therefore, he was entitled to recover. On p. 223, Wills, J., in his judgment, says:—"It seems to me to follow, in such a case as the present, where the existence of negligence on the part of the defendants, and the absence of contributory negligence on the part of the plaintiff, are specifically found as matters of fact, if the defendants desire to succeed on the ground that the maxim, *Volenti non fit injuria*, is applicable, they must obtain a finding of fact that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it." Now, that is, so far, one of the questions—was it necessary here for the defendant, besides the ordinary way of showing that he contracted, to go a little further, and show a free and voluntary contract? So far as I have gone in the case already, this decision of Wills, J., is borne out. Now, after that came a case, which I will just mention. It is the case of *Membery v. G.W. Railway Co.*, in 14 Ap. Ca., 179. And here we have Lord Bramwell and the others differing again on the main question of the case. We now come to this last case, in which I think that the whole of the law, as it at present stands, is to be found, and which seems to sustain the *dictum* in *Osborne v. L. & N.W.R Co.* This is the case of *Smith v Baker* (1891), Ap. Ca., at p. 325, reversing the decision of the Court of Appeal, in which it was held (Lord Bramwell dissenting) that the mere fact that the plaintiff undertook and continued in the employment, with full knowledge and understanding of the danger arising from the systematic neglect to give warning, did not preclude him from recovery; that the evidence would justify a finding that the plaintiff did not voluntarily undertake the risk of injury; that the maxim, *Volenti non fit injuria*, did not apply; that the action was maintainable. To that

Lord Bramwell dissented. He stuck right out from the very beginning and up to the House of Lords, of which he became a member at last. He still dissented, and, if the House of Lords was right, Lord Bramwell was probably wrong. [His Honour here read the judgment of Halsbury, L.C., 338.] Now, that is the first of the defects or alleged defects in this plea. That plea does not cover consent to the particular thing being done which would involve the risk—that is to say, does not consent to the Government doing nothing when danger arose. Lord Bramwell says, on p. 344:—"In the course of the argument I said that the maxim, *Volenti non fit injuria*, did not apply to a case of negligence; that a person never was *volens* that he should be injured by negligence at least, unless he specially agreed to it; I think so still. The maxim applies where, knowing the danger or risk, the man is *volens* to undertake the work. And I think the maxim does apply here; for the complaint in the statement of claim (the only thing proved) was, that there was no one to give notice when the stone was passing over where the plaintiff was at work. If this was wrong, the plaintiff knew of it, and voluntarily undertook the risk. The case is different with a street accident, where a man is injured by the act of one between whom and him there is no relation. It is not dangerous apart from negligent driving; there is indeed a likeness. I admit that personal negligence in the master would make him liable; so, also, the use of dangerous plant not known to the servant." Even Lord Bramwell says that the maxim, *Volenti non fit injuria*, did not apply to a case of negligence. You must have an agreement express or implied to that effect. Lord Herschell, at p. 360, says:—"The maxim is founded on good sense and justice; one who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong." Then, at p. 362, he says:—"Where, then, a risk to the employed, which may or may not result in injury, has been created or enhanced by the negligence of the employer, does the mere

continuance in the service, with knowledge of the risk, preclude the employed, if he suffers from such negligence, from recovering in respect of his employer's breach of duty?" I cannot assent to the proposition that the maxim, *Volenti non fit injuria*, applies to such a case, and that the employer can invoke its aid to protect him from liability for his wrong. It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk." That runs through the whole of this case. Now, it seems to me that on these authorities, when you plead *volenti non fit injuria*, you must go to the extent of showing that the party against whom it is pleaded was not under duress when he was said to be *volens*, and if he were under duress, I think that the plea is not proved. He must freely and really submit himself to the risk. By *The Navigation Act*, explosives of this kind, when they come into the port of Brisbane, have, under enormous penalty, to be delivered to the Government magazine in a certain specified way, or otherwise to a magazine provided as in the Act is enacted. Such magazines do not exist. And whether it was reasonable with the quantity of dynamite that was being imported into Brisbane by a private importer that such magazine should have been started by the plaintiffs might have been a question for the jury, and, if they found that it was reasonable that it should have been, then upon that would have arisen the question whether under these circumstances he could be said to have freely agreed. But there is no allegation of the necessity for any such thing either by the quantity of the business done, or the bad way in which the Government did their work. So that, unless that was so, I consider that the plaintiffs did not act freely in doing it. They had no other course. And that renders the plea defective. As to the second point, that this plea does not cover the whole cause of action, it only

goes to show that they had knowledge that the storehouses themselves, and the locality in which they were, were unfit and improper, and that, with that knowledge, and knowing the risks attending the storage of the goods in the storehouse in that locality for many years prior thereto, they still undertook, and continued to undertake, the risk, and thereafter, with that knowledge, deliberately brought an action against the defendant for a number of causes of action based on negligence, one of which was that the storehouses were unfit and improper. The jury found that that was so. The next allegation was, that the locality was unfit and improper. The jury found that it was so. And to these two findings it is necessary to add a further charge that I have alluded to. It does not, in my opinion, extend beyond that. But the plaintiffs sued, in addition to that of putting into an improper house situated in an improper locality, that they did not take proper care, and to that the defendant has not said that the plaintiffs have agreed, and the plaintiffs not having agreed to that, and the maxim *Volenti non fit injuria* not applying to that part of the case, the plaintiffs are entitled to judgment. I think that it may be collected from the findings that had that question been put to the jury they could not, and I think no reasonable man could, but find on the face of these findings that the plaintiff was not agreeable to the Government simply doing nothing to save the goods if necessity arose. I think that they had to take as much care to avoid these goods being damaged in respect to the flood going down the river as they had if they found the Defence Force practising with ball, and it was possible that their balls would hit the building, and if they did not send notice and take care to stop it, and the building got hit, they would be liable. I think that the plaintiffs must succeed. There will be judgment for the plaintiffs for £7,684 8s. 4d. In this case there were certain statements in the plaintiffs' pleading which I did not think it was necessary should be put in issue. The defendant put in a statement of defence traversing everything. The matters I refer to are contained in

paragraphs 8, 4, and 7 of the statement of claim. Notwithstanding that they put these into issue, they dallied about giving admissions, and ultimately refused to give the admissions necessary for the purpose in the form required by the rule. True it is, that certain of these facts were to be picked up as admitted in defendant's solicitor's letters, but that caused a great waste of time during the trial, and created the necessity for a great deal of evidence. I had determined, if the Government had obtained judgment in this case, to disallow them the costs from the plaintiffs in so far as the costs have been increased by reason of these trifles. As the case has turned, however, they will have to pay the costs of the action, so no special order will be necessary, but for a direction to practitioners in future cases I point this out.

From this judgment the defendant appealed, and there was a cross appeal on the part of the plaintiffs as to certain findings of the jury.

After argument, the Court reserved judgment.

COOPER, J.: In this case I have the misfortune to differ from the other members of the Court. I unfeignedly regret it, but it is clearly my duty to give effect to my opinion, which has been forced upon me by such study of the case as I have been able to devote to it. The plaintiffs are merchants and importers of explosives into Queensland, and the nominal defendant represents the Government of the colony. The plaintiffs imported a large quantity of explosives into Brisbane before February, 1893, and they were received into the Government magazine by defendant's servant. In February unprecedented floods caused the Brisbane River to rise to an extent theretofore unknown, and in consequence a large quantity of the explosives was damaged and destroyed. The plaintiffs sued for the value. The rule which governs the liability of the defendants in such a case was, I think, clearly expressed in the *Mersey Docks case*, 1 H.L., 93. In the *Sanitary Commissioners of Gibraltar v. Orfila*, 15 Ap. Ca., at p. 408, Lord Watson, who delivered the judgment of the Privy Council, quotes with approval a passage from the judgment in the

Mersey Docks case, and, at p. 411, says:—"In these circumstances the question arises whether it be according to the intention of the two Orders-in-Council that the commissioners shall be responsible." The rights and liabilities of the defendants in this case are defined and controlled by the statute law, and the cases of *Reg. v. Williams*, 9 Ap. Ca., and *Farnell v. Bowman*, 12 Ap. Ca., 643, are authorities to show that the principle of liability for negligence established by the *Mersey Docks case* is applicable to colonial Governments. In applying that principle to this case, the question arises, What did the Legislature intend by Part VII. of *The Navigation Act*? Did they intend that the Government should be warehousemen of explosives and subject to all the liabilities of ordinary traders, or that they should be merely custodians of the public safety? If the intention had been that the Government were to be warehousemen, I should have expected to find that a discretion had been left to them to receive or refuse at will the goods when tendered to them by the importer; that they should have been allowed to fix their own charges for their services; that their servants in an emergency should have been allowed a discretion to remove the goods temporarily to another place. Part VII. of *The Navigation Act* begins at sec. 163, which is as follows:—"Every person or persons who shall import gunpowder or any other explosive substance into Queensland shall immediately, when it shall arrive in any port, report the same to the Collector or principal officer of Customs, and also to the officer in charge of the Government magazines, in order that the same may be deposited in one of such magazines, and the said officer shall receive the same into his custody. . . : Provided always that the officer in charge of the magazine may at any time refuse to receive therein, or to allow within its precincts, any explosive substance, the properties of which may be unknown to him, and which he may have reason to apprehend to be unsafe for lodgment in the general magazine, and such explosive substance shall be so dealt with as may be considered

by the Treasurer to be necessary for public safety." All the other sections, except secs. 173 and 174, contain elaborate provisions against dealing incautiously with explosives. Section 173 has been repealed, but is replaced by sec. 12 of *The Port Dues Revision Act*, which fixes the storage rent for gunpowder, &c.; and sec. 174 provides that the explosives may be sold for payment of rent. It seems to me, therefore, that Part VII is intended to permit, under stringent conditions, the importation of explosives into Queensland, and to protect the public from danger or loss as completely as human foresight can do it, and as is consistent with a reasonably convenient handling and transmission of such substances. I therefore think that in requiring the magazine-keeper to receive, under certain conditions, explosives tendered to him, and to deliver them up after certain formalities have been complied with, Part VII. was not intended to cast upon him any other duty than that of protecting the public against the disastrous consequences of the accidental explosion of large quantities of dangerous chemical compounds. If it were part of the duty of the keeper of the magazine to devote his attention in an emergency to saving the property of importers, it is easy to imagine many cases in which such duty would conflict with his duty to the public. I think that the Legislature did not intend this, but that the public safety should be paramount. This view is not weakened but rather confirmed by the wording of the repealed statutes which preceded *The Navigation Act*. Section 103 of *The Customs Act* was pressed upon us as showing the necessity for enacting that the Government shall not be liable for damage to importers' goods under Government control occasioned by fire, inevitable accident, or felony. The inference being that in the absence of such a provision in *The Navigation Act* the Government are liable. I think that the omission was probably made because the intention to limit the liability of the Government is sufficiently clear without it. In cases of this kind, I think the Government cannot be held responsible

except for a tortious interference with the goods; there is no pretence of such a thing here. I am, therefore, of opinion that the defendants are entitled to our judgment. The defence I have discussed, though which upon argument before us was not taken as it ought to have been, by way of demurrer, and therefore the defendants are not entitled to their costs of the trial. I think there ought to be judgment for the defendants with costs of this appeal, but without costs of the trial.

CHUBB, J.: I am of opinion that this appeal ought to be allowed. The action was brought against the Government of Queensland by virtue of *The Claims Against the Government Act*, 29 Vic., No. 23, and the claim was founded on the alleged negligence of the Government and their servants in respect of the storage of a quantity of explosives—dynamite and detonators—deposited in a Government magazine under the provisions of *The Navigation Act of 1876*, 41 Vic., No. 8, Part VII., secs. 163 and following, and *The Port Dues Revision Act of 1882*, 46 Vic., No. 12, sec. 12, and the third schedule—which explosives were destroyed by a flood. The effect of the two last-mentioned enactments is, I think, to make the Government, in respect of explosives so deposited, an ordinary bailee for reward, and the same duty is cast upon them by law as would attach to a private person in the same position, and under the same circumstances. *The Queen v. Williams*, L.R. 9, Ap. Ca., 418. The duty in the present case is to take ordinary and reasonable care of the explosives in a magazine reasonably safe for the purpose. *Searle v. Laverick*, L.R. 9, Q.B., 122. If any authority is wanted for authority to sue the Government under *The Claims Against the Government Act* in respect of negligence, it will be found in *Farnell v. Bowman*, 12 A.C., 643, a case decided upon an enactment of New South Wales, which is practically the same as ours. But the Government have not disputed the bailment, nor their alleged duty, nor the right of the plaintiffs to sue. The jury have found that the explosives were destroyed by the negligence of the Government in not providing proper storehouses

in a proper locality, and in not taking proper care. The destroying agent was unquestionably the flood, but the jury have found that the loss did not arise from inevitable accident through the rapid rising of the flood, and that the Government by reasonable care could have foreseen and guarded against it. I see nothing in the evidence to show that the abnormal flood of 1893 could have been or was foreseen by anybody. If it had been, it seems to me that it could only have been guarded against by either removing the buildings to some locality above a flood-mark which was not then known, or by raising the land and buildings, or the platforms in those buildings, to some unascertained height. The magazines had been in the same locality for years, and only once, in 1890, was any damage done by flood to explosives there. The flood of 1890 was the highest known before 1893, and immediately after the 1890 flood the platforms of the coal-shed—where the dynamite now in question was subsequently stored—were raised above the level of that flood. The argument for the plaintiffs must be—if it is to prevail—carried to this extent—namely, that because occasionally very high tides have flowed into the shed, doing no damage, and one flood in 1890 did some damage—against a recurrence of which provision was made—therefore the Government were bound to foresee the 1893 flood, and all other floods of whatever height, and to guard against them. This would be to make the Government insurers. By parity of reasoning, every merchant who possesses on the banks of the Brisbane River goods-sheds which are known by the owners of goods stored therein to be periodically flooded, but which, notwithstanding, are highly convenient for the shipping and landing of merchandise, is guilty of negligence every time a flood happens and does damage to the goods. The proposition is too wide. This case lies, in my opinion, within the principle laid down in *Blyth v. Birmingham Waterworks Company*, 11 Ex., 784; and *Nitrophosphate Company v. London and St. Katharine Docks Company*, L.R. 9, Ch.D., 503. A person is not guilty of negligence in failing to take

extraordinary precautions against extraordinary, unusual and unexpected occurrences. The mere fact that a thing has happened before amounts to nothing, unless there is something to lead to the inference that it is likely to recur. This case is a stronger one, for the 1893 flood had not happened before—it was some 2ft 6in. higher than the 1890 one. I can therefore see no evidence to support the finding of the jury on the first and second heads of negligence. But, in addition, the plaintiffs' case is weakened by the finding of the jury that the plaintiffs knew at all times that the storehouses and the locality were unfit and improper, and that with this knowledge and of the risks attending the storage of explosives in such locality for many years prior to and up to the grievance, continued to deliver explosives to the Government for storage by them in such storehouses and locality, and undertook and continued to undertake such risks, and thereafter with full knowledge of all these things delivered the explosives to the Government for storage in its storehouses in that locality. I think this finding is a complete answer to the plaintiffs' case of negligence on the two heads mentioned. How they can be heard to complain of the unfitness of the storehouses and locality, if this finding can be supported in law and fact, I cannot see. As to the fact, the evidence is clear that the plaintiffs' storeman, Snow, knew all about the locality and the buildings, so must have known the men employed by the plaintiffs to lighter and deliver the explosives into the magazine. Their knowledge must be imputed to the plaintiffs. As to the law, it was contended that the deposit was compulsory under the statute and that the plaintiffs had no option, and were therefore obliged to accept the position. That is true so far as it goes, but the reasoning is fallacious. In the first place, the plaintiffs need not have imported the explosives; secondly, if they had desired, they might have provided a private magazine of their own (see sec. 180). But, as the jury have found, they with full knowledge undertook the risks arising from the unfitness of

the storehouses and locality. As to these matters, therefore, I think the plaintiffs have not made out any case. As to the finding of negligence in not taking proper care, I think there is some evidence to support it. The evidence, I think, showed that the dynamite could have been stacked higher; and although I see no evidence of negligence in the way the cases were stacked in the first instance—there being nothing to show that this was not the customary and safe way of doing it—yet, when the flood became imminent, the stacks could have been made higher by reducing their bases, and in that way the loss might have been diminished. And so, also, after the first flood. Although the evidence for the defendant is very strong against this, I think something similar might have been done with the uninjured cases when the second flood became imminent. In either or both cases there must have been some loss, but the jury have not allowed for it. As to the detonators, there is evidence that if they had been properly stacked the loss would have been only six cases. Thirty cases were destroyed, and the jury have allowed for them all, at least six cases too many. It was strongly contended that the whole loss could have been avoided by the removal of the explosives from the magazine either by drays or in barges. I think this is putting the duty of the Government too high. The Government stands in the position of an ordinary bailee, no more, no less. What they could have done with “the Defence Force, the police, the crews of steamers, the Marine Force,” or “the whole resources of the colony at their back,” as suggested, was beside the question. They were not bound to take extraordinary precaution, such as would require the aid of these forces. They were bound to take reasonable care, and were not required by their duty to furnish drays or barges to remove the explosives. To require that would be to require of them more than ordinary care. But if it could have been done, where was the authority to remove the explosives? All that is regulated by the enactment, and the magazine-keeper cannot deliver a single case of dynamite out of the magazine except

to the person authorised under the Act to receive it. And where could it be taken? There was no other magazine, so far as the evidence shows. I think there is nothing in that argument. But although I think there was some evidence, which I have pointed out, from which the jury could find negligence, it is by no means clear that they have done so on that evidence. It is very possible—indeed, I think it very likely—from the way in which the case was conducted, that they found negligence in respect of not moving the explosives, as well as in respect of locality and storehouses. Further, the jury have assessed the damages in one sum in respect of the three heads of negligence found under question 9. It is impossible for the Court to say how much or how little they have found under each head, or whether they have found them under two, or only one head. Taking my view of the case, even if the whole sum could be appropriated to head (c), the damages would be excessive, because they have found the whole loss against the Government; whereas, in my opinion, a large part of it was bound to happen under the circumstances, for which they could not be held answerable. I am therefore of opinion that the judgment entered for the plaintiff should be set aside, and that there should be a new trial on the question of negligence, limited to the matters I have indicated. The appellants should have their costs of the appeal.

REAL, J.: With regard to the answers to questions 9 and 13, and the motion that they ought to be set aside, I cannot go so far as Mr. Justice Chubb has done. The Courts have gone so far in upholding the findings of the jury, that I feel bound to hold that the evidence given entitled the jury to find that a reasonable man ought to have anticipated a flood higher than that of 1890 and as high as that of 1893, and ought to have known that goods placed in a magazine or store at a height less than the level of the floods of 1893 was in danger of being injured by flood waters, and to that extent unfit and improper. I therefore think that the answers to these questions were supported by evidence, as far as the

knowledge of the locality of the magazine and the risks attending it were concerned. That, in my opinion, made a complete defence to plaintiffs' claim for damages, so far as it was founded on alleged negligence as to storehouse and locality. The answer to question 14, taken in conjunction with the direction of the learned judge on that question, seems to me to as much preclude the plaintiffs from recovering as if the plaintiffs had, with the opportunity of storing in a place above the level of the 1893 flood, selected the magazine at Eagle Farm Flats. This case, at the trial and by the learned judge in his judgment, seems to have been considered as an ordinary case of a warehouseman for hire, or if any destruction, as the case of a warehouseman to whom a monopoly was granted, and thereby involving some greater liability on the part of the Government and its servants to plaintiffs than would devolve on an ordinary warehouseman. It therefore becomes necessary to consider if the rule which applies to an ordinary warehouseman for hire is the true measure of the Government's liability in respect of explosives, and if not, what is? The Acts bearing on the subject (7 Wm. IV, No. 7; 5 Vic., No. 11; 13 Vic., No. 24; 18 Vic., No. 21; 24 Vic., No. 14, and *The Navigation Act*) subordinated everything to the public safety. Part VII of *The Navigation Act*, so far as it relates to explosives, is to be considered as passed solely in the interest of public safety. The Legislature has, by its enactment, in effect declared that a Government magazine, wherever situated, however constructed, is a fit and proper place to store explosives, and, except as was provided by sec. 180, a Government magazine is the only fit place. The Government was entrusted with the duty of deciding in the interests of the public safety when, how, and where a magazine was to be established or constructed. In my opinion, upon the true construction of that Act, it is not the province of a jury or this Court to revise the decision of the Government or question the suitability of the place at which they may have, in the interest of public safety, fixed a magazine. The duty of the

officer in charge of the Government magazine was to receive and keep therein the explosives delivered to him. No power was given to that officer or to any officer to dispense with this law, or substitute barges, carts, or any other place, building, or locality for the Government magazine. And I think that, so far from failing in any duty by not removing the explosives from the magazine, in contemplation of a flood, the servants of the Government would be guilty of a breach of duty in so doing, unless acting solely in the interests of public safety. In my view of the plaintiffs' case, it must fail in so far as it alleges that the Government servants were guilty of negligence in not removing the explosives from the magazine, even if there was evidence to show that the Government servants could have obtained barges authorised to carry explosives. I am, however, unable to discover any evidence in this case that there was any large barge or boat available which complied with provisions 168 of *The Navigation Act*, or cart or other carriage which complied with sec. 176; and no attempt was made, judging from the evidence, to prove that such were procurable within the time during which it was alleged the officers of the Government should have anticipated the danger. I do not, while deciding in this way, assent to the proposition that an ordinary warehouseman of ordinary goods will be bound to provide barges and send them down the flooded river to remove such goods when the owner thereof is equally aware of the danger and makes no effort to remove the same and no request to the warehouseman to furnish such barges. Indeed, I think that an ordinary warehouseman and the Government, if liable as such, would have no such duty. Where an officer of the Government has the legal custody of the property of any person, he must, in the absence of some statute relieving him from the liability, take reasonable care of the property so far as he can do consistent with the object for which the property is in his custody; and whilst he is of opinion that the officer in charge of the Government magazine has a paramount duty to do

all things necessary in the interests of public safety, and is not required to do any act which in his opinion, or the opinion of his superior, might possibly endanger the public safety, and that where the act or omission was *bond fide* taken or made in the interest of public safety, the propriety of such act or omission is not for the Court or a jury to determine. It was part of the plaintiffs' case that part of his goods might have been saved had they been re-stacked. There was no evidence to show that before the flood of the 5th February had wetted the explosives, or any part of them, that there would have been any impropriety or danger to the public safety from stacking the detonators in tiers or the explosives in tiers of ten cases instead of eight. On the contrary, it appeared that such stacking was in part adopted, and the caretaker did not say that it was in any respect dangerous. With regard to the question of restacking after the flood of 5th February, there was evidence that the removal would have been unsafe. I think there was evidence to support the finding of the jury to question 9c, so far as it can be taken as finding want of care on the part of the officers in charge of the magazine in not restacking before the flood of 5th February to reduce the amount of damage. I think that the motion of the plaintiffs ought to be dismissed, certain findings of the jury set aside, and a reassessment of damages obtained.

COOPER, J.: The judgment of the Court will therefore be, to set aside the findings of the jury in answer to questions 9A and B, and 17, 18, and 19, and a new trial had between the parties to reassess the damages.

Solicitor for plaintiffs: *J. F. Fitzgerald.*

Solicitor for defendant: *J. Howard Gill.*

Act of 1886 (50 Vic., No. 16), s. 18—Contract under seal—O. XXXIX, r. 10—O. LVII, r. 6—Reversal of judgment.

With the Brisbane Bridges and Ferries Board, the plaintiffs entered into an agreement to build a punt, place it on a ferry, and to run it for two months. The plaintiffs alleged delivery, payment on account, and sued for the balance. The defendants denied the contract; alleged that, if made, it was not under seal; that it was not in writing, as required by the *Statute of Frauds*; and that before any breach the contract was rescinded by a new agreement.

The jury found that there was an agreement to build contained in certain of the exhibits; that the agreement, though not under seal, was signed by the president or two members of the corporation for the purpose of the contract acting by direction; that the punt was built in accordance with the plan, but was not delivered, and that there was a rescission before breach.

Harding, J., entered judgment for the defendants.

Where there are several defendants represented by separate counsel, having practically the same defence, only one address to the jury will be allowed.

Held, on appeal, by Chubb, Cooper, and Real, JJ., that the contract was proved on the facts, that the punt was delivered, and there was no rescission of the contract.

Held also, that, as practically the same evidence would be given at a new trial, the Court had power to set aside the findings of the jury and enter judgment under O. XXXIX, r. 10, for the plaintiffs for the amount claimed.

THIS was an action by the plaintiffs, consulting and mechanical engineers, for £1,038 13s. 11d., the balance due on an alleged contract to build a punt for the defendants, the councils of the Municipalities of Brisbane and South Brisbane, which had been constituted a joint local authority, under the name of the "Brisbane Bridges and Ferries Board." The contract price was £2,000. The defendants denied the agreement; and pleaded that the agreement, if made, was not in writing, as required by *The Statute of Frauds and Limitations of 1867*; and was not authenticated by writing under the common seal of the corporation; that the agreement was not made as required by *The Local Government Act of 1878*. They also denied the building and delivery of the punt, or any payments on account, and pleaded rescission by the substitution of a new agreement.

CLARK AND FAUSET v. MUNICIPALITY OF BRISBANE AND ANOTHER.

Contract—Sale of goods—Delivery—Rescission—Local Government Act of 1878 (42 Vic., No. 8), s. 160—Local Authorities (Joint Action)

Lilley for the plaintiffs. *Feez* for the Municipality of Brisbane. *Byrnes, A.G.*, and *Manafield* for the Municipality of South Brisbane.

A question then arose as to the right of counsel for both corporations to address the jury.

HARDING, J.: I have been told that that is the first time the question has arisen. I know it has arisen as far as allowing only one set of costs is concerned, and it is not the first case in which the question has arisen as to whether two counsel should be heard. Under the circumstances, however, I may as well refer, if the point is a new one, to the authorities on the question:—*Chippendale v. Masson*, 4 Camp., 174; *King v. Williamson*, 3 Stark, 162; *Hogg v. Tindale*, 3 C. & P., 565; *Perring v. Tucker*, 4 C. & P., 70; *Massey v. Goyder*, 4 C. & P., 162; *Sparkes v. Barrett*, 8 C. & P., 442; and *Mason v. Ditchbourne*, 1 M. & Rob., 462, are the cases in favour of one address only. On the other hand, there are: *Ridgeway v. Philip*, 1 C.M. & R., 415; *Child v. Stenning*, 7 Ch.D., 413; *Nicholson v. Brooke*, 2 Ex., 213. So far as I can see, the universal practice, approved by the Courts of Appeal, is that only one counsel should be heard. I think I have done right in allowing both counsel to examine witnesses; it might have brought out something to show that there was some difference between them. As far as I can see, the statements of defence are as near together in words as two gentlemen sitting in two different chambers and without consulting each other could arrange them. I think they had on coming into Court the same defence, except on one point, which has since been amended. Practically, then, they were defending on the same ground, and had the same means of defence. The question might or might not arise subsequently whether, these defendants having separated in this way, more than one set of costs should be allowed. This would arise in the case of the plaintiffs failing and having to pay costs of the action. There is a universal rule that where two defendants sever their defence, and fail, only one set of costs will be allowed, in the same way as if they had been united. It was intended that

litigation should be free, and not carried on in such an expensive way as that parties would be crushed out by the heaping up of costs. On the whole, therefore, I am of opinion that only one counsel should be allowed to address the jury for the defendants, and that if counsel do not make any arrangement among themselves it should be the senior counsel representing the several defendants.

The jury found (1) that the agreement was made between the parties to build the punt, agreeably to the plan, for £2,000; (2) that the exhibits 3, 4, 5, 6 documents were proved; (3) that the agreement was in writing contained in those exhibits; (4) that agreement 6 (the report of the Joint Authority) was signed for no other purpose than creating a contract; (5) that the agreement was not under the seal of the corporation; (6) that the agreement was signed by the president, acting by direction and on behalf of the corporation, as required by *The Local Government Act*; (7) that the agreement was signed by Messieurs Luya and Hipwood and sanctioned by the president, as required by that Act, putting exhibit 6 out of consideration as an acceptance; (8) that the plaintiffs built the punt according to the plan; (9) that the plaintiffs did not deliver the punt to the corporation on 6th April, 1893; (10) that £2,000 did not thereupon become due to the plaintiffs; (11) that between 6th April and 10th October, 1893, the corporation did not make payments to plaintiffs on account; (12) that the balance claimed was not due on 10th October; (13) that the agreement was rescinded by mutual agreement about 3rd March; (14) that a new agreement was substituted in lieu thereof; (15) that this was before breach; (16) that exhibit 2 was the order in council; (17) and awarded no damages.

HARDING, J., entered judgment for the defendants with only one set of costs between the defendants, as though they had joined in the defence.

The plaintiffs moved at the June Full Court that the above judgment should be set aside, and

that, notwithstanding the findings of the jury, judgment might be entered for the plaintiffs for the amount claimed, or in the alternative that a new trial be had between the parties.

Lilley and Macgregor for plaintiffs. *Byrnes, A.G., and Feez* for defendants.

COOPER, J.: In this case the plaintiffs were contractors, and the defendants were the Municipalities of Brisbane and South Brisbane, who, by an Order in Council, dated 18th February, 1893, were constituted a joint local authority under the name of the Brisbane Bridges and Ferries Board, for the purpose, amongst others, of establishing and maintaining ferries across the Brisbane River. The defendants being about to establish a ferry across the river, and being in need of a punt for the purpose, the plaintiffs, on the 2nd March, 1893, submitted a plan for a punt, with a description of the steam machinery and gear necessary for working it. They stated that the cost would be £2,000, and that it would be got ready in ten or twelve days. They agreed to guarantee it for two months if allowed to appoint their own engineer, and to run the punt altogether, providing men and coal, for the sum of £25 a week. They also undertook to submit to a penalty of £20 a day in the event of any delay arising through defect of plant or machinery. The punt was to be worked by means of a revolving drum on either side carrying a cable, which was anchored to the ground on both sides of the river. The defendants accepted this offer, and on the evening of the 6th April the punt was placed in the position agreed upon, and was afterwards continually used for the purposes of a ferry. I am of opinion that the plaintiffs performed their part of the contract on the 6th April, and that, therefore, the £2,000 became due by the defendants to them, unless the statute, under which alone the defendants were capable of entering into a valid contract, makes provision for the observance of formalities which were neglected. Now, sec. 160 of *The Local Government Act of 1878* enacts that the council (in this case council means the Brisbane Bridges and Ferries Board) may enter into contracts, and

(subsec. 2) that any contract "which, if made between private persons, would be by law required to be in writing, signed by the parties to be charged therewith, the council may make in writing signed by the chairman." The contract between the plaintiffs and defendants seems to me to be contained in the documents numbered 3, 4, 5, and 6 respectively of the exhibits. The latter is a copy of the minutes of the meeting held by the Bridges and Ferries Board on 9th March, 1893, and sets out in writing the acceptance of the terms offered by the plaintiffs, and is signed by the chairman. The jury have found that it was signed for the purpose of creating a contract, and I am of opinion that there is sufficient evidence to justify that finding. It follows that the contract is in writing, and therefore binding on the defendants. But the jury have found that the plaintiffs did not deliver the punt to the defendants, and that the £2,000 did not become due. This can only mean that the plaintiffs did not perform the contract on their part. I have already said that I hold the contrary opinion; the evidence on the point is, to my mind, overwhelming, and there is no evidence whatever to support the jury's finding. The defendants, however, pleaded a rescission of the contract before breach, and the jury found the facts in their favour. I am of opinion that there is no evidence whatever of any rescission of the contract before breach; but it was argued before us that there was in reality a new contract substituted for the original one, which operated as an accord and satisfaction by which the plaintiffs agreed to keep the punt and to run it as a ferry on their own account. The evidence shows that negotiations were on foot between the parties with the object of re-transferring the punt to the plaintiffs on certain conditions, and they dalled with the matter in such a way that I am not surprised at the jury coming to the conclusion that the plaintiffs never parted with their property at all. These negotiations never resulted in a formal contract. If the defendants had been private persons under no restriction as to incurring liability by conduct, a binding arrangement

might have existed between them and the plaintiffs, but sec. 160 of *The Local Government Act of 1878* prescribes the manner in which the defendants could only legally contract. No such contract (which in this case was required to be in writing) was ever made between the parties, and it therefore follows that the plaintiffs are entitled to succeed. The jury have found as a fact that the defendants have made no payments to the plaintiffs on account, but inasmuch as the plaintiffs have given credit for certain sums which they acknowledge having received, they are entitled only to judgment for the amount claimed. There will be judgment accordingly, with costs.

CHUBB, J.: I am of the same opinion; but I am inclined to think that the relief to which the plaintiffs are entitled is somewhat different to that which my brother Cooper has indicated. Now, the plaintiffs have attacked certain findings of the jury. The jury have found that there were two contracts, a written contract and a parol contract, and I think there is evidence to support both of these contracts. To that extent I think the findings of the jury must stand. The written contract is in accordance with the provisions of *The Local Government Act*; and in regard to the parol contract, although the jury have found there was no delivery to the defendants of the punt, there was, in my opinion, a performance of the contract, and that is the light in which the question should be regarded. Was there a performance of that contract by placing the punt in the position that was stipulated in the contract? The contract was to build a punt, place it on the ferry, and run it for two months. Well, that the plaintiffs have done. So far as the contracts are concerned, I think the findings of the jury are correct; but in replying to the question whether there was any delivery, I am of opinion that there was no evidence by which the jury could find their answer of "No." Consequently, that answer must be set aside; and following on that, all the answers of the jury contingent on that finding. For instance, the answers to questions 10 and 12 depend on that; and if there were no

other findings against the plaintiffs, they would be entitled to judgment. But there are some other findings found against the plaintiffs, which if they stood would prevent the plaintiffs from recovering upon the findings that I have referred to. These findings are, 13, 14, 15, and 17 on the rescission. Now, in the first place, a rescission to be good in law must be before breach. The authority for that is *Edwards v. Chapman*. 1 M. and W., 231. If there is an agreement put in to the old contract it must be accord and satisfaction in some form, and the accord and satisfaction must be pleaded, and performance, accord and satisfaction must be pleaded and proved. It is perfectly clear, from the view I take, that there can be no rescission before breach, because the punt was placed in position in accordance with the contract at the ferry. Therefore, that finding, in my opinion, was contrary to the evidence, and consequently the answer of the jury to question 13 must go; and, also, the answer to question 15. Was this before breach? Well, even if there had been rescission, it was not a rescission *simpliciter*, a mutual agreement to abandon the contract, the plaintiffs taking back the punt, and the defendants keeping their money; but they (the jury) found that it was done by the substitution of the new agreement in place of the old one. As my brother Cooper has remarked, that agreement, to be binding, must be in accordance with *The Local Government Act*. It was not in accordance with *The Local Government Act*; and, further than that, it was not contended that there was the slightest evidence to show that Mr. Stephens, Mr. Hipwood, and Mr. Luya had any authority to make such agreement. At the most, they were authorised to make an agreement for the purchase and delivery of the punt. They were not authorised to do anything more. Consequently, on two grounds, the rescission of the new agreement cannot be supported. Well, that disposes of the whole of the questions which have been found against the plaintiff. Now, I should like to say a word or two on some of the cases that were referred to. It was contended by the counsel for

the defendants, that these were mere negotiations—that the contracts were mere negotiations; that there was to be a subsequent agreement containing the full terms of the contract to be signed between the parties. But I think the authorities cited by Mr. Lilley are conclusive. In the present case, the agreement was completed, and it was contained in the exhibits found by the jury. The whole agreement was there. There was no stipulation that a subsequent agreement was to be drawn up containing such terms or other terms. The agreement was completed, and finally as soon as it was signed by Mr. Stephens, and subsequently confirmed. The words used in exhibits 6 are to the effect, I think, that “the Board adopted the report and instructed Mr. Stephens to get an agreement from Clark and Fauset and have it ready for signature by the next meeting.” At the next meeting these minutes were confirmed. There was a complete agreement—a perfectly good agreement—made by these minutes; and on the cases cited by Mr. Lilley that is plain. *Rossiter v. Miller* was the case which settled the whole question as to the agreement with respect to the subsequent documents. That was before the House of Lords, and it is reported in 3 Ap. Ca., at p. 1128. The decision of the Lord Chancellor in the case of the *Marchioness of Ely* is concurred in by Lord Cairns in this way. And then Lord Westbury uses these words:—“I entirely accept the doctrine contended by the plaintiff’s counsel, and for which they cited the cases of *Fowle v. Freeman*, *Kennedy v. Lee*, and *Thomas v. Dering*, which establish that if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the *Statute of Frauds*, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties. As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged, or his agent

lawfully authorised, there exist all the materials which the Court requires to make a legal binding contract.”

Well, the cases are numerous on this question. There was one case referred to by Mr. Feez. That was the case of *Wins v. Bull*, 7 Ch.D., 29, which is clearly distinguishable from the authorities cited by Mr. Lilley and from the facts of this case.

Then there were two cases referred to by the learned Attorney-General on the question of contracts made by minutes signed for some other purpose. The case that he referred to was *Eley v. The Positive Life Assurance Company, Limited*, 1 Ex.D., p. 20. That was a special case, and it was held by the Court that the signature to the articles of association which were affixed *alio intuitu* were not signatures to a memorandum of the contract within the *Statute of Frauds*, so as to bind the company.

It was held, also, that the articles of association were a contract between the shareholders *inter se*, and did not create any contract between the plaintiff, who was not a party to them, and the company. Even so, the Court there found that the minutes were signed *alio intuitu*. There the jury have found the contrary. They have found that the minutes were actually signed with the intention of creating a contract. That distinguishes the case from the present case, and also from the case of *Jones v. The Victoria Graving Dock Company*, 2 Q.B.D., p. 314, which was a special case submitted to the Court with power to draw inferences of fact; and it was found as a fact by the arbitrator, who submitted the case in the 9th paragraph that there was a completed contract (which the jury found here); and on the argument here, Lush, J., says it was contended “first, that, notwithstanding the finding in the 9th paragraph, which is, in effect, that, upon the acceptance by the plaintiffs of the terms proposed to them as a modification of the 11th clause of the draft, there was a complete contract between the parties, the Court can see that this is a wrong inference from the facts stated, and that we are

bound either to disregard that statement, or to construe it in a sense different from what the words ordinarily import, and to hold that the terms agreed on were merely the heads or leading stipulations of the contract, which were to be afterwards elaborated into detail, and supplemented or varied, as the case might be, when the contemplated deed should come to be settled." He went on to say, with regard to the contract, "It is not the less efficient as a signed admission of the contract because it was made as a record of the proceedings of the company under the obligations of *The Companies Acts, 1862-67*. The question is not what its object was, but whether it is a written and signed statement of the contract."

So that *Jones v. The Graving Dock Company* is an authority analogous to the facts of this case. There it was found that there was a complete contract; that the minutes were signed for the purpose of completing the contract, and it is on all fours with this case.

I do not think it necessary to refer to the cases cited by the defendants, in reference to the powers of contracting by corporations under the provisions of the statutes. All the cases cited by Mr. Feez were cases where the statutes said that absolutely certain contracts should be made under seal, and in no other way. The Court of Appeal thought that the provisions of the statutes were imperative. So they are in this case, where provisions are given in Acts of Parliament to enable certain things to be done. There is no absolute rule; but they are in general construed to be imperative. The provisions of *The Local Government Act* say corporations may contract in a certain way. "Way" means that if they make a contract, they must do it in that way. There is nothing in the cases cited by the defendants' counsel which in any way affects the validity of the contract made in this case.

Well, then, the question comes in, What relief are the plaintiffs entitled to? On the pleadings without any amendment, the plaintiffs are entitled to judgment, in my opinion, for £2,000, less the amount that they have given credit to the

defendants as having received themselves (the plaintiffs). Now, is the Court precluded from entering judgment for them? Mr. Lilley, in his argument, said that he could not ask the Court to enter judgment for him; but that he must ask for a new trial, on the authority of *Davies v. Felix* (4 Ex.D., p. 32), an English case. Our rules are somewhat different from the English rules; and we have the power, if we have all the facts before us necessary to give effective and final judgment, to do so. But there is this difficulty: If we send the case for a new trial on the pleadings as they stand, it must go with an intimation from this Court, that the jury can find only one way. That would seem an absurdity—to send a case back again, and to have all the expenses of a new trial, when the judge, on the opinion of this Court, would be bound to direct the jury that they must find for the plaintiffs. So that, if we have the power to do it, I should be inclined, subject to what my brother judges may say about it, to enter judgment for the plaintiffs for the amount they claim. But then there is this to be said: The plaintiffs sued on the original agreement. They have another agreement, or possibly had another agreement, to run the punt for a certain number of weeks on a certain arrangement. The defendants disputed the original agreement, and they pleaded that that this agreement was rescinded by the new agreement, it was not necessary to set forth accord and satisfaction. It might be that on the amendment of the pleadings, the plaintiffs suing on the original contract, and in the alternative on the new agreement, and the defendants pleading to the old contract, and setting up, as they might possibly be able to do, accord and satisfaction, justice might be had between the parties. I am inclined, subject to what my brother judges may think, to suggest that that course should be followed, if the parties are willing to accept it. If they are not, we must send the case back for a new trial, with an amendment on the question of the £2,000; or, give leave to either party to amend so as to raise that question of the substituted contract ~~and~~

accord and satisfaction. If that cannot be done, I think all we can do is to give the plaintiffs a new trial, unless we can see that we ought to enter judgment for them under our rule. Is there any chance of that arrangement being accepted?

Can the defendants carry the proof any further?

[Feez : I would not like to pledge myself ; but I do not suppose we could carry these things much further. I would not like to admit that we cannot take the proof further ; but I do not suppose we could.]

In that case the new trial must go, I think. I think the Court has power, notwithstanding Mr. Lilley's cases, to enter judgment for him.

The English rule of appeal is different from ours. It says that the Court may draw inference of fact not inconsistent with the findings of the jury. Now, these words are not in our rule. Our appeal rule, O. XXXIX, r. 10, says "the Court may, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, or may, if it is of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and may direct such issues or questions to be tried or determined, and such accounts and enquiries to be taken and made, as it may think fit."

Order LVII, r. 6, empowers the Court to give any judgment, and make any order which ought to have been made, and to make such further order as the case may require.

I think we have all the merits before us for giving judgment ; and under that rule I think the plaintiffs are entitled to judgment for £2,000, less something. I won't say anything more until we hear what Mr. Feez has to say. He wishes to say something about the amount.

REAL, J. : I am practically of the same opinion as my brother judges. Pleadings (O. XIX, r. 4) are to state the facts upon which the party pleading relies before the trial, and are all the Court has to guide it, but after action tried the Court

should grant such relief as the parties are entitled to upon the facts before the Court and not legally in dispute ; in other words, the admissions made and the findings of the jury, so far as the latter are supported by any evidence. (His Honour here reviewed the pleadings and the findings of the jury.)

The plaintiffs move to set aside the judgment in favour of the defendants. There is no motion by the defendants, but their counsel contend they are entitled, if they can, to satisfy this Court that the finding of the jury in favour of the plaintiffs, without which the plaintiffs would not be entitled to judgment (however 9 to 17 are answered), are against the evidence ; and that if they can so satisfy the Court, the plaintiffs' motion must fail ; and they contend that the findings of the jury in answer to questions 3, 4, 6, and 7 are against the evidence ; that, in fact, there was no valid contract between the plaintiffs and the Board. They rely on *Young v. Mayor of Leamington*, 8 Ap. Ca., 517, and other cases, which are, to my mind, conclusive that a corporation cannot be bound by a contract not made as directed by statute.

The Brisbane Bridges and Ferries Board was a joint local authority under *The Local Authorities (Joint Action) Act of 1886*, and was constituted by an Order in Council (Ex. 1) on 16th February, 1898. This Order in Council, by virtue of sec. 18 of *The Act of 1886*, applied to the Brisbane Bridges and Ferries Board all the provisions of *The Local Government Act of 1878* ; and the defendants rely on sec. 160 of that Act, as rendering this contract invalid. Sec. 160 deals expressly with contracts which, when made between private persons, require (1) to be under seal ; (2) to be in writing ; (3) which do not require to be in writing. It makes no express provision as to contracts which can be made without writing, but which under certain circumstances require to be evidenced by writing. The absence of such provision cannot, I think, be held to make a contract in writing necessary to bind the Board in such last mentioned cases. Such contracts, of course, require to be made by persons authorised as men-

tioned in the section, and must, I think, be evidenced as required by the general law; and when that evidence as to contracts of the same nature between private persons is required to be in writing signed by the person making the contract, or the agent lawfully authorised. I think the true construction of sec. 160 is, that the signature evidencing the contract of the Board should be that of the chairman or two members duly authorised to make the contract, or authorised to sign the document used as evidence. Exhibit 6—minutes of the Board with the other documents referred to therein, contain the whole contract found by the jury. These minutes were signed by the chairman or president in, to say the least of it, the usual course; and in the case of *Jones v. The Graving Dock Coy.*, 2 Q.B.D., 314, it was held that such a signature was sufficient. The facts of that case appear on pages 317, 318, and 319, and see judgment of Lush, J., on page 323. In that case the resolution contained the words: "Draft to be engrossed in duplicate and the seal of the company to be affixed thereto." Here the jury find in effect that the president signed exhibit 6 for the express purpose of creating a contract. That he was authorised to sign the minutes is not disputed. That he did so is not disputed. But defendants contend there is no evidence that such signature was made for the purpose of constituting the contract or under such circumstances as to be binding on the Board. Looking at the nature of the contract, the short time in which it was to be completed, the evidence that when made the person authorised to make it had accepted the punt, and had directed the plaintiffs to proceed at once with the work of fitting it up, that the president was one of the persons to whom the plaintiffs' tender was referred by the Board, that one of the persons making the contract reported to the Board, that one of the terms of which, as reported and entered in the minutes, was, "that the whole statement contained in report were to be in writing," and the known practice that minutes when entered and correct ought to be signed by the chairman, I think there was ample

evidence to support the finding of the jury, that exhibit 6 was signed for the express purpose of creating a contract, or in the words of the answer, "for no other purpose." And I further think, that such signatures so made, even if made for another purpose, in addition to that of creating a contract, are a sufficient signature to satisfy the provisions of the *Statute of Frauds* and sec. 160 of *The Local Government Act of 1878*, assuming that the contract was one which required to be in writing, or evidenced by writing duly signed. I find myself unable to accede to the contention on behalf of the defendants, that the statement at the end of the minutes—"the chairman was authorised to get an agreement from Messrs. Clark and Fauset and have it ready for signature at the next meeting"—taken with the words of the report entered in the minutes—"and the whole of the within statement to be in writing"—are sufficient to preclude the jury from finding a contract between the parties, and necessarily converted that which had taken place between the parties into mere negotiations. On this point, see *Jones v. The Graving Dock Coy.*, 2 Q.B.D., 314; *Bonne-well v. Jenkins*, 8 Ch.D., 70; Judgments of James, L.J., 73; Baggallay, L.J., 74; and *Lewis v. Brass*, 3 Q.B.D., 667. The words in the minutes purporting to be part of the report by Alderman Luya—"and the whole of the within statement to be in writing"—seem to me to support the contrary. They, to my mind, show a concluded contract; and that the parties thought writing, if not necessary to its validity, at all events a reasonable thing to require from the Board; and that those acting for the Board in the making of the contract promised to do that which was in fact carried out by the report being entered in the minutes and signed by the chairman. Indeed, it would, in my opinion, be unreasonable to hold that the transactions between the parties in this case had not advanced beyond the stage of negotiations when the evidence is, that those appointed by the Board accepted the punt "Bruce," directed the plaintiffs to proceed with the work, inspected the work during its progress, and allowed the plaintiffs to drive piles

in the approaches to the ferry, when in fact the plaintiffs, with the approval of the Board, completed the whole work, as found by answer to question 8. For the reasons given, I am of opinion, with my brother judges, that there was a complete and binding contract between the parties, even if, by reason of sec. 160 of *The Local Government Act of 1878*, it required to be in writing, or by reason of *The Statute of Frauds and Limitations Act*, it required to be evidenced by writing, signed by the chairman duly authorised to sign for that purpose. It is therefore for the present unnecessary for me to consider the question whether or not there was a binding contract between the parties apart from exhibit 6. The claim states the contract between the parties as if the punt was not in *esse* at the time of the contract; as if the contract was merely for the manufacture of a chattel of a certain class; and the questions put to the jury seem in their form to follow the wording of the statement of claim; but, as I have already pointed out, we, now that the contract is found by the jury to be contained in exhibits 3, 4, 5, and 6, must look solely at these documents to ascertain the contract, and if that alleged in the claim is not the same, the claim must be disregarded. The contract contained in these documents, so far as it can be at all considered a contract for the sale of an article, is clearly for an article in *esse*, the punt referred to in exhibit 6. The corporation really intended that they were to have that punt. That is the punt they examined and the punt they say they accepted. It appears evident that this particular punt was the subject matter of the contract, so that if anybody had offered a better price therefor, Messrs. Clark and Fauset would not be at liberty to dispose of it, and perform their contract by supplying another punt of the same class. The cases relating to shipbuilding contracts show that the mere fact that, by the terms of the contract, something has to be done to a vessel will not prevent the property in the part constructed passing. In such cases, although the contract is to build a whole ship, still, after the keel is laid and part of

the price is in pursuance of contract paid, the property at once passes to the purchaser, unless there is something in the contract to show a contrary intention. Thus, effect is given by the law to the presumed intention of the parties, as evidenced by the contract, to pay, and the act of paying as the work proceeds, see *Seath v. Moor*, 11 Ap. Ca., 350, per Lord Watson at 380, and per Lord Bramwell at 385.

In this case it is not, however, necessary to consider that question very closely because the plaintiffs completed their contract—(see answer to question 8)—and their right is the same, whether the property in the punt passed to the Board immediately, or the passing was postponed until all the work to be performed on it by the plaintiffs had been performed. It is clear that as soon as everything to be done to it by the plaintiffs had been performed, the property vested in the Board. See *Rugg v. Minett*, 11 East, 200; *Kibble v. Gough*, 38 L.J.N.S., 204, and see, at page 206, per Bramwell, J. When the property passed from the plaintiffs to the Board simultaneously, and as a necessary consequence there vested in the plaintiffs a right to recover payment from the Board at the time, and in the manner fixed by the contract; and therefore, upon the findings of the jury in answer questions 1 to 8, without reference to question 9, the plaintiffs were entitled to judgment, unless the defendants proved payment by accord and satisfaction or release. But, assuming, contrary to the fact, that the punt was not a chattel in *esse* at the time when contract made, I think the contract contained in exhibits 3, 4, 5, and 6, and the work to be done under it, were such that a finding involving the completion of the work, for which the £2,000 was the agreed price, necessarily involved the performance by the plaintiffs, with the assent of defendants, of such an act of appropriation of the punt manufactured to the particular contract as would suffice to pass the property in the punt to defendants; and, as a necessary right, vest the payment therefor in plaintiffs; and that delivery, unless the word is used in the sense of such appropriation, was not

necessary to entitle the plaintiffs to recover the contract price. It is said in *Benjamin on Sales*: "There is no branch of the law more confusing to the student than that of delivery. This results from the fact that the word delivery is used in very different senses; and unless these different significations are very carefully borne in mind, the decisions furnish no clue to a clear perception of principles. The word delivery is sometimes used with reference to the passing of the property in the chattel, sometimes to the change of the possession of the chattel. In a word, it is used to denote a transfer of title or transfer of possession. Even where delivery is used to signify transfer of possession, it is employed in two distinct classes of cases, one having reference to the formation of the contract, the other to the performance." In this case, a valid and binding contract in writing being in existence, even if the contract was for the sale of something not in *esse*, something to be manufactured by the plaintiffs, something wholly unappropriated to the contract till manufactured, and requiring therefore what may be called delivery, using the word to denote a transfer of title, or more correctly, in the sense of an act done by one party to the contract with the assent of the other, and sufficient to transfer the title to the chattel manufactured from the person manufacturing to the person who, before its manufacture, had agreed to become the purchaser of such chattel. The work provided for in the contract contained in exhibits 3, 4, 5, and 6 included driving piles in the approaches to the ferry, which was under the sole control of the Board, and placing the punt when complete on that ferry with steam up ready to ply on wire cable anchored at each approach out of the traffic way, acts which could not be done by the plaintiffs without the assent of the Board, in whom was vested the control of the ferry, acts which, if done with the assent aforesaid, would be a distinct appropriation of the punt to the contract, and amount to a delivery in the only sense of the word delivery could be material to the rights of the parties in this case. Therefore, I think, a finding to the effect

that the contract contained in exhibits 3, 4, 5, and 6 was completed, necessarily involves a delivery sufficient to entitle plaintiffs to recover the contract price. Questions 1 and 8 and the answers thereto must be read together, and both must, I think, be read in conjunction with the answer to question 3. Question 1 asks was it agreed between, etc., that the plaintiffs should build the punt agreeably to plan for £2,000. The £2,000 mentioned in question 1 was the whole sum agreed to be paid for all the work included in the contract found in answer to question 3, and therefore in question 8, the words, "did the plaintiffs build the punt in accordance with the plan," would necessarily, when coupled with question 1, be understood to mean—did the plaintiffs do all the work included in the contract? It must, I think, be taken that the question was so understood by the jury, and that they in their answer were not confining themselves merely to the punt. The plaintiffs had to fix it in position; although the plaintiffs' statement of claim alleges only a contract to build a punt, that certainly was not the whole contract contained in exhibits 3, 4, 5, and 6. If they had completed the punt in every respect, but had not placed it on the Alice-Ernest Street Ferry on wire cable by them anchored at each approach out of traffic way, they would not be entitled to the £2,000 mentioned in the first question, and therefore an affirmative answer to question 8 would not be material between the parties unless we take that question, "did they build the punt in accordance with the plan," as conveying to the minds of the jury, "did plaintiffs build the punt in accordance with the plan, place it in position with wire cable anchored at each approach of the Alice-Ernest Street Ferry and with steam up, ready to ply? And, as in the case of *Langton v. Higgins*, 28 L.J. Ex., 253, the act of putting the oil into the vendee's bottles and weighing it was held to be a delivery to the vendee in the sense of transferring a title to the oil, so in this case the placing the punt on the ferry with steam up, ready to ply on cable anchored, etc., by the plaintiffs, with the knowledge, without objec-

tion from and in pursuance of the contract with the Board, and therefore with the assent of the Board, constituted a delivery (or appropriation) sufficient to transfer the property in the punt to the Board, if it had not previously vested in them; and looking at the nature of this contract, the acts which had to be done, and which were done, in the performance of it by the plaintiffs, with the knowledge of, and without any objection from, the Board, in conjunction with the notice sent by the plaintiffs to the Board after the completion of everything (see exhibit 7), received and not objected or excepted to by the Board, I think delivery of the punt was conclusively proved in every sense in which that word can be used, a delivery amounting to an actual receipt and acceptance sufficient to satisfy *The Statute of Frauds*, and render writing unnecessary, assuming the contract between the parties to be a sale of goods, and sufficient to support the findings of the jury in answer to question 6. As stated in the course of the argument, this Court will not set aside the findings of the jury where there is a conflict of evidence; but in this case on the uncontradicted evidence, the jury were, I think, bound to answer the question as to delivery in the affirmative, because the facts admitted, taken with the answer to question 8, would at law amount to a delivery. I now come to the defendants' substantive defence—an alleged new agreement. This was pleaded as if action had been, not for contract price, but for damages for refusal to accept. The word rescission is inapplicable to a completed agreement; yet, no matter how pleaded, a substituted agreement has been found by the jury; and, if there is evidence to support the finding, the defendants must have the benefit of it. But after contract completed and the right to receive the contract price accrued, such an agreement, to be a defence, would require to amount to accord and satisfaction; and therefore I think there would be a mistrial if the actual agreement was not ascertained; and if ascertained, I think the plaintiffs would be entitled to the same relief as if they had originally claimed under such substituted agreement. To some

extent, I sympathise with the jury in their finding, that there was a new agreement between the parties when they came to consider whether or not a new contract had been made between the parties. I am not surprised if they came to the conclusion that the Board accepted the terms in the plaintiffs' letter, exhibit 9. The only evidence of any contract would be of a contract on terms as proposed by Clark and Fauset, not expressly made, but constituted, if at all, by the act of the Board with respect to exhibit 9 sending no answer thereto for the space of nine weeks, and leaving the plaintiffs during that time to go on running the ferry, supposing that their offer was accepted, subject to and upon those terms to which they had assented in exhibit 9. If the Board did not intend to so accept, I think it would have been more honest between party and party to have at once refused to agree to the terms mentioned in exhibit 9, notwithstanding that the plaintiffs were in any event bound to continue running the punt under the original contract and therefore suffered no actual loss by the Board's delay; were only deceived by being led to believe that they were running it during that time for their own benefit, and not under the terms of the original contract. But the Board could not thus bind themselves. The cases cited are distinct on that point. The only way the Board could bind themselves would be, by contract made, as provided by sec. 160 of *The Local Government Act of 1878*, by the chairman or two persons duly authorised by the Board to make the contract; and, as the plaintiffs were bound, by their original contract, to go on running the punt so long as the Board required, there is no evidence that has been brought to our notice or that I can discover of any assent on the part of the plaintiffs to a new agreement on the terms demanded by the Board. There is no law empowering the Board to make a contract binding on the plaintiffs without their assent, and the Board not having, in a manner binding on it, assented to the terms upon which the plaintiffs were willing to contract, it appears to me in this case there was no contract whatever

made between the parties after the contract contained in exhibits 3, 4, 5, and 6 for rescission or otherwise. The plaintiffs therefore succeed on this motion. The finding in answer to question 9 must be set aside; and the findings as to the alleged new agreement must be set aside. This involves the setting aside of findings in answer to questions 9, 10, 12, 13, 14, and 15. The finding in answer to question 17 is immaterial. The action was not for damages; and upon the findings of the jury, there is no question of damage—it is a question of contract price. Now, as regards the relief which we should give to the plaintiffs on this motion: Whether we should on this motion enter judgment for them or merely grant a new trial on the questions, answers to which we set aside, I prefer not to express an opinion until I have heard what Mr. Feez has to say in particular on this point—whether, if a new trial be granted, he has any reasonable expectation of being able to better his position; that is, whether he has any reasonable expectation of being able to support the findings which we now set aside by any further or better evidence than was submitted to the jury in this case, and upon which we hold that the jury should not have answered as they did. Mr. Feez says there are only two courses open to the Court: one to direct a new trial on the questions—the answers to which we set aside, which the Court certainly has power to do, which the Court on the cases cited by Mr. Lilley would be bound to do if our law was the same as the law in England—but this Court has, under our rules, held that upon a motion to set aside findings of the jury, etc., the Court may, after setting aside a finding, if satisfied that it has all the material before it, give judgment for the party who appears to be entitled, even when such judgment could not be entered if the finding set aside had stood. If our rule were worded as the English rule, possibly we would not be able to put the construction put sometimes on our rule; but the words differ, and it appears to me that it would be an absurd thing to send the case for a new trial if we can do anything else, when, if a new trial is granted, the parties in whose

favor the questions have been answered have no reasonable hope of producing at the new trial any other or better evidences than that which this Court now declares insufficient. If, under such circumstances, this Court must direct a new trial—if that is the only thing which can be done—you, the parties, will go through all the expense of preparing for a new trial; a jury will be called, you will give precisely the same evidence, and the judge presiding would have to so direct the jury thus: Upon the decision of the Full Court, I tell you you should answer that question in a particular way. If there were any reasonable probability of further evidence shewing that the contract was not completed, delivery not effected, or that a substantial contract was duly made, some evidence that the defendants did not produce at the former trial, and of which we have not had the benefit; if there were anything of that description, I think the justice of the case would require a new trial. At present I do not see that there can be any further evidence. Counsel for the defendants do not suggest the probability of anything further; and I think it is narrowed down to a question of, What can we do? Must we direct a new trial, or may we give judgment for the plaintiffs? It appears to me that the law in this colony—the Judicature Rules cited by my brother Chubb—gives to this Court, where it has all the facts before it, the power of pronouncing judgment, even if the proper judgment is inconsistent with a finding of the jury which has been set aside. That is a power which does not appear to be given by the English rule, which seems to limit the power to a judgment not inconsistent with a finding of the jury. The evidence as to delivery, and everything bearing on that question in any possible way, seems to have been before the jury. A further trial on question 9 (delivery) would be a useless expense, for if our view of the law is right the jury upon such evidence could answer the question only in the affirmative; and, if our view of the law is wrong, the defendants are as little prejudiced thereby now as they would be after a new trial. As to the other questions, I think it

would be reasonable if defendants' counsel intimated to the Court that they thought it probable they might be able to prove, for instance, that the corporation, in a binding manner, assented to a new agreement such as the evidence shews to have been—the offer by Clark and Fauset. Because a man cannot be made a party to an agreement against his will, or that further evidence would be forthcoming to show the assent of Clark and Fauset to an agreement in the terms of defendants' offer, I think there should be a new trial on the questions relating to an alleged substituted agreement; but, as nothing has been intimated to the Court, and practically the same evidence would be given, that also would seem to be a useless proceeding; and unless this Court is compelled by law to adopt a useless proceeding between the parties, I think we would not be justified in so doing. For these reasons, I think our judgment should be: Set aside findings of the jury in answer to questions 9, 10, 12, 13, 14, and 15, and enter judgment for plaintiffs for amount claimed. The jury find that there was no payment on account of the contract price; but the plaintiffs did not amend their claim, and cannot get judgment for more than the amount claimed. I do not enter into the question whether or not the plaintiffs must be taken to have been running the punt for the Board under the agreement contained in exhibits 3, 4, 5, and 6 (see exhibit 5), by reason of their offer to run it on other terms not having been accepted by the Board. That is perhaps the view under which plaintiffs have given certain credits. I do not decide that the plaintiffs' act of giving credit can in any way limit or affect the defendants' right, if any, to recover for the use of the punt, or in any way affect the rights between plaintiffs and defendants, otherwise than by limiting the sum which the plaintiffs in this action can obtain judgment for.

On the whole case, therefore, I agree with the judgment of my brother judges, that the findings mentioned be set aside, and judgment entered for the plaintiffs.

Solicitors for plaintiffs: *Lilley & O'Sullivan*.

Solicitors for Municipality of Brisbane: *MacPherson & Feez*.

Solicitors for Municipality of South Brisbane: *Thynne & Macartney*.

IN INSOLVENCY.

HARDING, J.

13th June, 1894.

20th August, 1894.

In re BLOCKSIDE.

Insolvency Act of 1874 (38 Vic., No. 5), ss. 101, subsecs. 4, 152—Removal of trustee—Good cause shown.

A trustee in the estate of a liquidating debtor was removed for failing to call a meeting to explain why a dividend had not been declared for six months, and for not taking possession of certain furniture allowed to the debtor, without which there was nothing to divide amongst the creditors.

The meaning of the words "upon cause shown" in subsec. 4 of sec. 101 of *The Insolvency Act* explained.

MOTION for the removal of A. C. Wylie, trustee in the estate of G. H. Blocksidge, of South Brisbane, commission agent, for wilful neglect in not taking possession of certain property of the debtor, and for failing to call a meeting of creditors to explain why a dividend had not been declared, and for other reasons.

The facts appear in the judgment.

Lukin for W. Bryant, a creditor, in support of the motion. *Chambers* for the trustee.

HARDING, J.: The motion for the removal of the trustee has been supported, on the grounds that the trustee was guilty of wilful neglect in not taking possession of certain property of the debtor, amounting to misconduct; that he was guilty of neglect in not summoning a meeting of creditors to explain his reasons for not declaring a dividend; that he did not report to the official trustee; that he did not examine the debtor as to his affairs; that he gave no notice of his appointment to any of the creditors; and that he did not search and see whether the resolutions of the creditors were registered. The facts of the case, as developed in the affidavits and the cross-examination of witnesses, were that on June 16,

1893, the liquidating debtor called a meeting of his creditors; that it was resolved thereat that the affairs of the liquidating debtor should be liquidated by arrangement, and not in insolvency; that A. C. Wylie, the respondent in the present motion, should be appointed trustee; that Thomas Heaslop should be appointed committee of inspection; that the debtor should be granted his office furniture, including an iron safe, and also his household furniture; that he should be granted his discharge; that Chambers, Bruce & McNab should be intrusted with the registration of the special resolutions. The resolutions were all filed, and, with the exception of that relating to the furniture, were all registered. That resolution, not being a special resolution, did not require registration. Since this time no dividend has been declared, and no meeting convened to explain to the creditors the reason for not declaring a dividend. Now, power to remove a trustee is given to the Court by sec. 101, subsec. 4, of *The Insolvency Act*, in the following terms:—"The Court may upon cause shown suspend or remove any trustee." A number of cases were cited to show the interpretation of the words "upon cause shown." *Ex parte Newitt, re Mansel* (14 Q.B.D., 177), and *ex parte Sheard, re Pooley* (16 Ch.D., 107), were two of them. I do not propose quoting from those cases, but I have adduced the rule from them, and it is probably correct to say that "upon cause shown" is not confined to cases where there is fraud, or dishonesty, or personal unfitness in the trustee, but it extends to cases where it is for the general advantage of those interested in the assets that a trustee should be removed by reason of conduct on his part which shows that it is no longer fit that he should remain a trustee, such as vexatious obstruction of the realisation of the estate in the interest of the debtor. The first ground in support of the motion was—"not taking possession of property, amounting to misconduct." The liquidating debtor had stated that his household furniture was estimated to produce £50, and his office furniture, including the iron safe, £12 10s. Those two items

made up £62 10s. The statement of affairs showed that the total debts amounted to £1,321 7s. 1d., and the total assets to £1,289 6s. 7d., which, including the furniture and the iron safe, gave to the bad £32 0s. 6d. So that on the debtor's own showing there would be nothing to divide, and that there being nothing to divide the creditors gave a realisable asset, the proceeds from which were divisible among the creditors, to the amount of £62 10s. to the debtor. The Court has power for just cause shown to direct the trustee to disregard the directions of the creditors, and to act contrary to them. That was laid down in *ex parte Cocks, re Poole* (21 Ch.D., 397); in *re W. Kelman*, in which, on July 25, 1888, I, on the application of a creditor, directed the trustee to disregard the first resolution, which allowed the debtor his furniture and some other property; in *re Pratten*, 5 Q.L.J., 95; and *re John Callaghan*, June 16, 1890. The question is whether the trustee, under the circumstances of this case, ought to have disregarded the creditors' directions. There were three courses open to him. He could have come to the Court for advice, stating the circumstances, or he could have called a meeting of the creditors and obtained their directions, or he might have consulted with the committee of inspection, neither of which he has done. Where, as in this case, an estate shows a deficiency, and a part of the estate, to so large an extent as £62 10s., is given as a gift to the liquidating debtor, the trustee ought certainly to have investigated the matter and taken some steps for the benefit of the estate, if not for the purpose of clearing himself from liability. He did neither. I think it was his duty to do so. In sec. 152 there is a positive enactment that, in the event of his not declaring a dividend for the space of six months, the trustee should convene a meeting of creditors and explain to them the reason. Had Mr. Wylie done that, he might have received instructions which would have relieved him from his present position. I think that Mr. Wylie was wrong in not having done that. Mr. Wylie has also failed to make the return prescribed by

law to be sent to the official trustee in insolvency, and there also he seems to have been in the wrong. I need not refer to the other points. I order that the trustee be relieved from his office as trustee in the estate, and that he pay the costs of the motion.

Solicitor for applicant: *Hallicar*.

Solicitors for trustee *Chambers, Bruce & McNab*.

MATRIMONIAL CAUSES JURISDICTION.

CHUBB, J. 20th August, 1894.

PARKER v. PARKER AND AH SAM.

Divorce—Rule 14—Costs—Cross-examination by party not answering.

A co-respondent, who has filed no answer, is not entitled at the hearing to cross-examine the witnesses, for the purpose of showing that he ought not to be condemned in costs.

THE petitioner asked for a dissolution of his marriage, on the ground of his wife's adultery with the co-respondent and other persons unknown, and prayed that the co-respondent might be condemned in costs.

The respondent did not appear.

The co-respondent appeared, but filed no answer.

Ross for the petitioner. *Milford* for the co-respondent, under Rule 14, to be heard on the question of costs.

At the close of petitioner's examination, *Milford* asked to cross-examine for the purpose of showing that the respondent was a common prostitute, and that the co-respondent did not know her to be a married woman. [CHUBB, J.: The co-respondent has filed no answer. You cannot cross-examine.] Evidence on these points is material for the Court in deciding the question of costs as affecting the co-respondent. It was allowed by Cooper, J., in *Deighton v. Deighton* in October, 1888. In *Norris v. Norris*, 1 Sw. & Tr., 174, the Court refused to hear counsel at all, but that was before E.R. 15, of 1860. E.R. 56, of 1865, to which our Rule 14 corresponds.

CHUBB, J.: The rule allows you to be heard on the question of costs, but not to cross-examine the witnesses in the cause. In *Nelson v. Nelson*, 1 L.R., P. & M., 510, the co-respondent filed an answer setting up the matters you wish to cross-examine on. After the decree is pronounced I will hear you on the question of costs, if necessary. The jury found the adultery charged, and counsel for the petitioner then moved for a decree *nisi* with costs against the co-respondent. Chubb, J., pronounced the decree *nisi*, and, without calling upon *Milford*, refused to condemn the co-respondent in costs.

Solicitors for the petitioner: *MacDonald & O'Malley*.

Solicitor for co-respondent: *Milford*.

AUGUST SITTINGS OF THE FULL COURT.

REGINA v. HOUSTON.

Crown case reserved—Embezzlement—General deficiency—54 Vic., No. 5—36 Vic., No. 8, s. 1—Respite of sentence.

A member and paid secretary of an Oddfellows' Lodge may be convicted of embezzling sums of money, the property of the lodge.

On a charge of embezzling specific sums, evidence of a general deficiency in the accounts is admissible.

Semble, that, when a prisoner is convicted, and a case reserved for the opinion of the Full Court, the sentence should either be respited or bail allowed until judgment is given.

CROWN case reserved by NOEL, D.C.J., for the opinion of the Court on certain points raised in the course of the trial of Robert James Houston, at Cooktown, on 1st June last. Prisoner was a member, and the paid secretary, of the Little Captain Cook Oddfellows' Lodge, Cooktown. He was charged in three separate counts with embezzling specific sums of money, the property of the lodge. He was tried, found guilty, and sentenced to three years' penal servitude. The questions submitted to the Court were whether the judge was right in admitting in re-examination evidence as to a general deficiency in the accounts, the prisoner being charged with the embezzlement of specific sums; and whether,

being a member of the lodge, the prisoner could be convicted of embezzlement of its funds.

HARDING, J., pointed out that authority was given in the Act to either respite or postpone sentence pending an appeal. That power had not been exercised in this case, and it seemed to him that if the same course was always followed a man might be made to serve a sentence when the point to be decided was whether he was guilty or not.

Dickson for the Crown.

GRIFFITH, C.J.: The first point raised in the case is whether evidence of a general deficiency is admissible on a charge of embezzling a specific sum. In this case evidence of a general deficiency was tendered in the examination-in-chief and rejected by the learned judge, but afterwards admitted in re-examination. Whether, if the evidence had been properly rejected in chief, it could under the circumstances have been admitted in re-examination is a matter on which I express no opinion. But I know of no authority for holding that evidence of a general deficiency is not admissible in chief on a charge of embezzlement. I do not know of any authority to that effect, even before *The Act of 1890*; and since that Act it is quite clear that a man may be convicted on evidence of a general deficiency. The other point is, that prisoner, being a member of the lodge, could not be convicted of embezzlement of the funds. That is expressly met by *The Act of 1872*, which provides that a person who, being one of two or more beneficial owners of money, steals it, may be convicted as if he had not been a beneficial owner. And that has been held to apply to the case of a secretary of a joint stock company although he himself is one of the directors of the company. Both the points that have been raised on behalf of the prisoner therefore fail. The case has not followed the rules in stating whether the sentence was respited. The sentence was three years' penal servitude, but it would appear that the judge gave the prisoner the option of obtaining bail, and authorised him to be admitted to bail. Prisoner was, however, unable to get bail. If the case had followed the

rules, no difficulty would have arisen on this point. I do not, however, think it necessary to express any opinion whether the judge was bound either to respite the sentence or to postpone execution of it. I think that in most cases the judge should do so, if not in all. If the case had precisely followed the rules, it would have, I think, been unnecessary to say anything on the subject. The conviction ought to be upheld.

HARDING, J.: I am of the same opinion. With regard to the question of respiting judgment, I think that, when a Crown case is reserved under *The Criminal Practice Act*, sec. 48, the judge should either respite the execution of the judgment or allow the prisoner to go out on bail; and if bail is not procurable, then he should be respited in such a manner that he should not undergo any part of his punishment. The question does not directly arise, and when it does arise, it will probably be in very different proceedings from this. That is my opinion; and that is the course which should be followed.

KEAL, J.: I am of the same opinion. I desire to express no opinion on the necessity of the judge respiting or postponing sentence, except to say that in ordinary circumstances I feel it would be quite proper to do so. Whether it would be bad if the judge did not do so, I express no opinion.

Conviction affirmed.

REGINA v. ROYLE.

Larceny Act of 1865 (29 Vic., No. 6), s. 76—
Embezzlement—54 Vic., No. 5, s. 1.

When an offence under s. 76 of *The Larceny Act of 1865* relates to a valuable security, it is sufficient to allege the embezzlement to be of money without specifying any valuable security; and the allegation, so far as it relates to a valuable security, will be proved if the offender is proved to have embezzled any amount or part of the particular valuable security.

It is not necessary to prove that the deficiency unaccounted for did not consist entirely of securities where the sum is made up of money and securities. Since 54 Vic., No. 5, it is immaterial that more than three separate sums were included in the deficiency. *R. v. Keena*, L.R., 1. C.C.R., 113, discussed.

CROWN case reserved by PAUL, D.C.J.

A. W. Royle was employed as cashier and accountant by Prosser, Taylor & Co. His duties as cashier were to receive all moneys, cheques, drafts, &c., paid to the firm, and deposit the same in the bank to the firm's account. His duty as accountant was to keep the books, and especially the general cash-book, bank deposit book, and demand orders deposit book, and to make proper entries in them of receipts and deposits. A Mr. Deighton was also in the employ of the firm as assistant book-keeper, and his duty was, under prisoner's directions, to write up the general cash-book from the rough cash-book, which contained entries of the receipts of all moneys received by the firm from day to day. The employees had authority to receive money in the warehouse for the firm in the way of business, such as for cash sales, &c., and their duty was to make entries of such payments in the rough cash-book and hand the money to the prisoner as cashier. Deighton received money as well as cheques, &c., in this way, and he always handed the same to the prisoner, and so handed him money, cheques, &c., in April last and during previous months. The entries of amounts received in the general cash-book for the month of April were in Deighton's handwriting, except three which were written by the prisoner, but all the entries in that book of deposits made in the bank for that month were written by the prisoner. In addition to the entries of receipts in the general cash-book, taken by Deighton from the rough cash-book, he also received items for entry from the prisoner, but where the prisoner obtained them Deighton did not know. Mr. Horstmann, who was the auditor for the firm, discovered, on examining the books in May last, and especially the general cash-book, that there appeared, according to that book, a general deficiency in the month of April of £784 4s. 6d., and that the short deposits commenced in November last. The general cash-book for that month showed £8,444 18s. 10d. as received, and £7,650 as deposited, showing a deficit of £794 4s. 6d. The larger

proportion of the entries of the amounts purporting to have been received according to the general cash-book, not only in April but for other previous months, would, His Honour said, consist of money orders, cheques, and drafts, but all were entered as cash in the cash-books. Mr. Horstmann could not discover from the books the individual or specific items of which the deficit was composed, or discover any specific amount received by the prisoner during April or any previous month as not having been deposited; but the deficit comprised more than three items, and he (Mr. Horstmann) believed comprised about thirty or forty items. The prisoner had charge of the cash-box, and after he left the firm, on the 28th May, it was opened, and found to contain £2 11s. 11d. cash and an I.O.U. of one of the employees for £11 10s. After this date Mr. Colledge, manager of the firm, saw the prisoner, and asked him if he could account for the deficiency in the books being nearly £800. The prisoner said he knew it was something like that, but that he could not account for it, nor did he benefit by it. Mr. Rutledge, prisoner's counsel, at the close of the case for the prosecution, asked His Honour to direct the jury to find a verdict of "Not guilty." His Honour refused to do that, but asked the jury to answer two questions as well as to deliver their verdict. The jury found the prisoner guilty, and answered the two questions in the affirmative—(1) Was the amount of the general deficiency stolen and fraudulently embezzled by the prisoner? (2) Did that amount consist of money as well as cheques and other securities? The points which His Honour reserved at Mr. Rutledge's request were: (1) That there was no case to go to the jury, inasmuch as sec. 1 of the Act, 54 Vic., No. 5, was limited to money and did not provide for proof of the embezzlement of money by evidence of a general deficiency in a case where the sums, in respect of which a general deficiency of money was alleged to arise, consisted partly of money and partly of valuable securities, such as cheques, drafts, and orders for the payment of money not shown to

have been converted into money by the prisoner.
 (2) That there was no evidence that any money had been paid to or received by the prisoner.
 (3) That the evidence showed that if any sums of money had been paid to and received by the prisoner, more than three such sums were included in the general deficiency. His Honour deferred passing sentence until the Full Court had given a decision on the points reserved.

Dickson for the Crown; *Rutledge* for prisoner.

GRIFFITH, C.J.: The prisoner was charged with embezzling the sum of £794 from his employers. On his trial it was shown that he was the cashier and accountant of his employers. His duties are set out in the special case. The general cash-book was intended to show all the money received by him. Entries were made in it by clerks under his superintendence. The book was not for the most part in his handwriting, but during the month of April last there were three entries in his handwriting. In the same book were entered statements of the amounts deposited in the bank, which for the month of April were all in his handwriting. The books were kept under his supervision. After he had left the firm's employ, and the books had been examined, he was informed that there was a deficiency of nearly £800. He said he knew it was something like that, but he could not account for it, nor had he benefited by it. It had been contended, though I doubt very much whether the point is raised by the case, that there was no evidence that he received any amount larger than was shown to have been deposited in the bank. But I infer from the evidence that, though the entries in the books were not all in the prisoner's handwriting, they were all made with his cognisance and knowledge, and therefore they operated as an admission against him. I draw that inference from all the facts stated, not as a necessary inference, but an inference which the jury might draw from all the facts as stated. I quite agree that it is not sufficient to show that the books were kept under his general superintendence. It must be shown that the entries were made with his knowledge. If,

therefore, that objection was intended to be raised, which on the face of the case stated was doubtful. I think it failed. Mr. Rutledge relied also on the case of *R. v Keena*, L.R., 1, C.C.R., 113. The 76th section of *The Larceny Act of 1865* provides, that, on an indictment for embezzlement, "where the offence shall relate to any money or any valuable security, it shall be sufficient to allege the embezzlement or fraudulent application or disposition to be of money without specifying any particular coin or valuable security; and such allegations, so far as regards the description of the property, shall be sustained if the offender shall be proved to have embezzled or fraudulently applied or disposed of any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved." The grammatical construction of that section is, that, when the charge relates to a valuable security, it is to be sufficient to allege the embezzlement to be of money, without specifying any particular valuable security; and the allegation will be sustained if the offender is proved to have embezzled any amount, although the particular coin or valuable security of which it is composed is not proved. The section was taken from the much earlier Act of 7 Geo. IV, Ch. 29, which came under the notice of the Court in the case of *R. v. Grove*, 1 Mood, C.C., 447, a case which has often been cited in cases of embezzlement sought to be proved by evidence of general deficiency. The plain, literal meaning of the section is, that, in charging a man with embezzlement from his employer, it is enough to charge him with embezzling money, although the evidence might show that he took money or valuable securities, or both, the term valuable securities including, by its definition, cheques and drafts and other securities. On this section the point raised by the prisoner's counsel is, that what was received by the prisoner consisted partly of cheques and partly of money, and that it was not shown that what he embezzled, or what he failed to account for, did not consist entirely of cheques. It is quite possible that he paid into the bank all the cash

that he received, and that he made away only with cheques. Apart from the statute, I should be very much inclined to think that it would be open to the jury, upon its being proved that a man received a large sum of money—using the word money in the ordinary sense, as consisting of cheques, notes, orders, and coin—and made away with a large part of it, to infer that the part which he made away with consisted in part of cash. But, assuming that that was not so, and that it must be taken in favour of the prisoner that all he made away with consisted of cheques, then, there being no evidence, although the jury found that some of the deficiency consisted of money—there being no distinct evidence that it did consist of money—Mr. Rutledge relied on *Keena's case*. In that case the prisoner was accused of embezzling £16. The evidence was, that he received a cheque for £16 for his master, and gave a receipt for it. He did not account for it, and went away. That was practically all the evidence. It was said to have been held that a section corresponding to sec. 76 of our *Larceny Act* would not justify the allegation of the embezzlement of money when it was only a cheque that had been embezzled and there was no proof that the prisoner had ever cashed it. This Court is not technically bound by *Keena's case*, but I think we ought to follow it unless there is some strong reason to the contrary, so far as we can discover the *ratio decidendi*. It may be that Lord Chief Justice Cockburn and A. L. Smith, J., thought that the Act referred only to cases in which what was actually taken was taken in the form of money. One at least of the learned judges was of opinion that the case against the prisoner failed otherwise. It appears to me that no clear principle can be drawn from that case applicable to such a case as the present, where the sum alleged to have been embezzled comprised a mixed fund, composed partly of cheques, orders, &c. What the prisoner took was part of a mixed fund, comprising cheques and money, and it appears to me that the Act expressly says that it is sufficient to charge him with embezzling money. It seems to me that this is

exactly the case of *B. v. Balls*, L.R., 1, C.C.R., 328, where a man, having to account weekly for the money he received, accounted for £90 only and kept £10. Not being able to discover any clear principle in *B. v. Keena*, I do not think we are bound to apply it to the present case. I think that the present case falls exactly within the terms of the 76th section of *The Larceny Act*. The third point raised was, that the evidence showed that if any sum had been received there were more than three such sums included in the general deficiency. That does not seem to be an objection, especially in the face of *The Act of 1890*, which provides that, "on the prosecution of any person for the larceny or embezzlement, as a clerk or servant, of money, the property of his master, it shall not be necessary to prove the larceny or embezzlement by him of any specific sum of money, if there is proof of a general deficiency on the examination of the books of account or entries kept or made by him or otherwise, and the jury are satisfied that the accused stole or fraudulently embezzled the deficient money or any part thereof." On the grounds which I have stated, I am of opinion that the conviction ought to be affirmed.

HARDING, J.: The prisoner's duty as cashier was to receive all moneys, cheques, drafts, &c., paid to the firm, and deposit the same in the bank to the firm's credit. As accountant, his duty was to keep the books, one being the general cash-book. Deighton was the assistant book-keeper under the prisoner's direction. He received moneys, cheques, drafts, &c., and he handed to the prisoner moneys and cheques received in April. The prisoner made entries in the general cash-book. He also made all the entries therein of the deposits made in the bank for April. The general cash-book for April showed a general deficiency of £794 4s. 6d.—£8,444 18s. 10d. being shown as received, and £7,650 14s. 4d. as deposited. It is further stated in the case that the larger proportion of the amounts purporting to have been received according to the general cash-book, not only in April but in previous months, would

consist of money orders, cheques, and drafts, but were all entered as cash in the cash-book. From this I deduce that some of the money, using the word in its largest sense, being less than half of the £8,444 18s. 10d., consisted of actual money (coin), but it is not necessary to require that so much as this, or so much as £794 4s. 6d., the amount alleged to have been embezzled, should have been paid in actual money (coin), the mere small sum handed by Deighton to the prisoner being sufficient to support the information if proved to have been received by the prisoner and embezzled by him. But this actual proof is not required under *The Larceny Act Amendment Act of 1890*. Here we have a general deficiency, on the examination of the books, which, with the evidence as above, and the answers of the jury to the judge's second question, showed that some money (coin) had been received by the prisoner. From that the jury were justified in concluding that money (coin) was embezzled. The prisoner might have rebutted this, but he did not do so. The conviction must be affirmed.

REAL, J.: To convict of embezzlement, it is necessary to prove that a man received money, using the word in the widest sense, as comprehending cheques or other valuable securities, and that it had been misapplied or fraudulently appropriated. Those are the two things which have to be proved, and many circumstances have to be proved in connection with them. That money has been received might be proved in many different ways, but it is the first principle of our law that a man is innocent until he is proved guilty. There might be circumstances of suspicion, all capable of being proved, and all tending to point to the possibility or probability of guilt; but such evidence has to be given to the jury so as to enable them to say, not that it was probable that the prisoner was guilty, but that he is guilty. I feel it necessary to say that, because it has been urged that there was no evidence that the prisoner had received money to a greater extent than he had paid into the bank. *The Act of 1890* provides that where a man has charged himself in his

account in the books kept by him, or the entries made by him with a sum of money, and has not accounted for the whole of it, the jury, if the man was a clerk or servant, might find him guilty of embezzlement. That section was no doubt made to simplify the method of proof, but I do not think that it altered the law. In all cases, an admission, or a confession, is said to be the highest proof that can be given of a man's guilt. That was the state of the law before the passing of the Act, and I do not think this Act has altered it in the slightest degree. I think the term "kept by him" was used in the sense of a person who made entries. I do not think it altered the law that a man who did not actually make the entries could not bind himself by admitting the correctness of the entries. The facts of the case show clearly that the prisoner knew and admitted the correctness of the entries on the debit side as concerning himself. That being so, it was his duty to see that the books were properly kept. To my mind, there was a clear admission of the receipt of the money, and the admission of correctness was as strong as if the prisoner had taken the books and written "correct" across the entries. The important question in the case is, that there can not be a conviction of embezzlement of money because there was nothing to show the receipt and non-paying over of cash. The section of *The Larceny Act* says, that an information could properly charge a man with embezzling money, when all he had done was to take a valuable security. The case of *R. v. Keena*, which has been cited as an authority to the contrary, is, in my opinion, quite inconsistent with the decision which has been come to by the Court. The two decisions can not stand together. I do not consider it necessary to follow that case, and am satisfied that the conviction ought to be confirmed.

Conviction affirmed.

Solicitors: O'Shea & O'Shea.

REGINA v. MCGEE.

Criminal Law Amendment Act of 1891 (55 Vic., No. 24), ss. 3, 4, 10—Rape—Want of corroborative evidence—Indecent assault.

A prisoner charged with rape on a child under twelve years of age was found guilty of an attempt to have unlawful carnal knowledge, under s. 4 of *The Act of 1891*, and of indecent assault. There was no corroborative evidence implicating the accused.

Held, that the conviction as to the attempt must be quashed, but the conviction for indecent assault affirmed.

CROWN case reserved by HARDING, J.

At the Ipswich Circuit Court, held on 28th July, Ernest McGee, who had been charged with having committed rape on a child under twelve years of age, was found guilty of an attempt to have unlawful carnal knowledge of such girl, and, also, of an indecent assault. The prisoner was defended by Mr. P. B. Macgregor, who raised the points (1) that as to the attempt there was no corroborating evidence within the meaning of the last paragraph of sec. 4 of *The Criminal Law Amendment Act of 1891*; (2) and that the jury, having found the prisoner guilty of the attempt, were *functi officio*, and the information exhausted. His Honour reserved these points. He sentenced the prisoner separately on each conviction, but made the sentences concurrent, and respite execution of the judgment until the questions raised had been decided. Meanwhile, he remanded the prisoner to gaol. In his statement of the case, His Honour stated that the only evidence implicating the prisoner other than the evidence of the girl to the commission of the offence was evidence that the prisoner was at the place and on the same morning, but before the time when the offence was sworn by the girl to have been committed. As to the time when it was committed, evidence was given in support of an *alibi* on the part of the prisoner. The question for the consideration of the Court was, therefore, whether the prisoner had been rightly convicted of the crimes charged against him, or either, and which of them.

Power for the Crown; Macgregor for the prisoner.

GRIFFITH, C.J.: The prisoner was charged with rape. By the 10th section of *The Criminal Law Amendment Act of 1894* it is provided that if on the trial of an information for rape or any offence made felony by the 4th section of the Act the jury are satisfied that the accused person was guilty of an offence under the 3rd, 4th, or 6th sections of the Act, or of an indecent assault, but are not satisfied that the accused was guilty of the felony charged in the information, or of an attempt to commit that felony, the jury may acquit the accused of the felony, and may find him guilty of such other offence, or of an indecent assault. Upon the trial of this man, therefore, he might have been convicted under the 3rd, 4th, or 6th sections of the Act, or of an indecent assault, or of an attempt to commit the offence of rape. But by the provisions of the 4th section, and the 3rd and 6th sections for that matter, it is enacted that no person shall be convicted of an offence under the section upon the evidence of one witness only, unless such evidence is corroborated in some material particulars by evidence implicating the accused. Upon the trial objection was taken that there was no evidence corroborating that of the prosecutrix within the meaning of the Act. The only evidence of a corroborative nature was, putting it at the highest, that the accused and she were alone together in the house where they both lived. They had not gone there for any particular purpose. They both lived there ordinarily, and had been living there for some time. For my own part, I do not think that that is corroborative evidence of an attempt to commit this kind of offence upon her. I think, therefore, that there was no corroborative evidence, and under these circumstances the prisoner could not be convicted under the 3rd, 4th, or 6th sections of the Act. But the rule requiring corroborative evidence does not apply to the charge of indecent assault. The learned judge told the jury that he could see no corroborative evidence, and advised them to acquit the prisoner of the attempt, and left it to them

whether he ought to be found guilty of indecent assault. The jury, probably thinking themselves wiser than the learned judge, and believing the girl's evidence, found that he was guilty of an attempt to commit an offence on a child under the age of twelve years, and they also found him guilty of indecent assault. The second objection was, that these two findings could not stand together, and that under section 10 the jury must find the prisoner guilty of one of the offences enumerated in the statute, or of an indecent assault, but could not find him guilty of two offences, and that the verdict finding him guilty of two offences was, therefore, bad altogether. That was supported by a very ingenious argument founded upon the words of this section, which might be said to point to the conclusion that the jury must make up their minds of what offence the accused was guilty, and say that he was guilty of one or another, but could not find him guilty of both. I think that in construing this section we ought to have regard to the general law and rules of the Court relating to criminal pleadings before the Act was passed. One of the rules at common law was, that a plaintiff could make his case in as many counts as he pleased, and if he succeeded in establishing one of them to the satisfaction of the jury, he was entitled to judgment on that. If damages were awarded jointly on a good and bad count the verdict would not stand. In criminal proceedings it was competent for the Crown to join as many charges as they thought fit in the same indictment—being all either felony or misdemeanour—and they were treated theoretically as charges of different offences. But that was mitigated by the rule that if a man was really charged with more than one act as a crime, the prosecutor could be called upon to elect which act he would proceed upon. Theoretically, as many charges might be included as the prosecutor thought fit; and, theoretically, if the jury gave a general verdict, it would be good. And it was not uncommon to combine charges of different offences in the same information either for misdemeanour or felony. That being the general practice under the old

rules, the Court by degrees, for the purpose of saving trouble and simplifying matters, introduced a rule that, upon the charge of an offence which necessarily involved a minor offence, the jury might find the accused guilty of the minor offence. That was in the first year of Queen Victoria, I think. That practice was further extended until brought to its highest development in this Act now before the Court. The question now is, What construction should be placed upon that new rule of procedure? Was an information, although containing only one count, to be treated as containing separate counts for each separate offence of which the accused might be found guilty under the one charge? For some purposes I think that is so. Mr. Justice Harding in this case took the verdict of the jury on each charge involved in the indictment. Other judges are content to take the verdict of guilty on one charge and to treat the verdict as one of not guilty on all the rest. The question, then, arises whether it was competent under these circumstances to find the prisoner guilty of more than one offence. It seems to me that the principle intended to be introduced by the Acts beginning with the last year of William IV down to the year 1891 was to introduce into the criminal procedure an analogous system to that provided for by the rules of common law procedure—so that the jury might, on a charge of this sort, if they found all the necessary ingredients of a criminal offence, give their verdict upon it, and in addition find other ingredients which would, together with the first, constitute a criminal offence of a higher degree. If that is the correct view, the two findings could not vitiate one another. A good finding supported by the evidence would not be vitiated by a finding unsupported by the evidence. I cannot find any authority, nor has any been brought under my notice, showing that a verdict, supported by evidence that a man was guilty of an offence, would be vitiated by a finding that he was also guilty of some other offence, which was not warranted by the evidence; nor do I know any reason why the verdict on one count should be

taken in priority of the other. One of them was warranted by the evidence; the other was not. Under these circumstances, I do not think the finding warranted by the evidence was vitiated by the finding not warranted by the evidence. For these reasons, I am of opinion that the conviction for the attempt should be quashed, and that for the indecent assault affirmed. I should like to offer one other observation in passing: Under the old rule, where there were several counts in the information, they were treated as separate charges, and the sentences upon them might be cumulative. They were, in point of fact, different counts; and there was nothing on the face of the information to inform the Court that the charges were all in respect of the same act. But where the same practical result, so far as regards the capacity of the jury to convict, arises under the statutory power, to which I have referred, the circumstances are different, because there the Court knows, on looking at the information itself, that it is only one act that is charged. It is not several charges, but only one; and although a man might be convicted on such an information of various crimes technically different, yet the Court knows that only one offence was charged. So that, in that case, I think there could be only one sentence; and if one offence was graver than the other, I think the minor offence would merge in the greater one.

HARDING and REAL, JJ., concurred.

The conviction for the attempted criminal assault was quashed, and that for the indecent assault affirmed.

Solicitor for prisoner: *P. A. O'Sullivan*.

BLACK v. TURNER.

Injuries to Property Act of 1865 (29 Vic., No. 5), s. 26—Bonâ fide claim of right—Wrongful admission of evidence.

A *bonâ fide* claim to use land as a highway, ousts the jurisdiction of justices on an information for malicious injury to a fence erected across such land. *Quære*, whether a map of the *locus in quo*, purporting to be drawn by a surveyor who is not called as a witness, can be admitted in evidence if objected to.

ORDER nisi to set aside a conviction of justices at Mount Morgan, against W. Turner, under s. 26 of *The Injuries to Property Act of 1865*, for unlawfully and maliciously destroying a fence, whereby the defendant was ordered to pay a fine of one guinea, thirteen shillings damages, and two pounds for costs.

The grounds for the rule were: (1) That the evidence disclosed no offence; (2) that there was no evidence that the defendant acted unlawfully and maliciously; (3) that the defendant acted under an assertion of a *bonâ fide* claim of right; and (4) that evidence was wrongfully admitted.

It appeared that a fence had been erected by the trustees of the Mount Morgan Racecourse across a track, which it was alleged had been in use for some years as a highway. The defendant, who had been in the habit of driving along this track, found it one day closed by a fence. He pulled down about 35 feet of the fence and made a way for himself. He was prosecuted for maliciously destroying the property of the Mount Morgan Racing Club, and set up as a defence that the track was a public road, and that he had a right to remove the obstruction.

It was also contended that the bench wrongfully admitted what purported to be a plan of the locality.

Lilley for appellant; *Boaz* for respondents.

GRIFFITH, C.J.: The appellant was charged with having unlawfully and maliciously destroyed a fence, the property of the trustees of the racecourse at Mount Morgan. The defence that he set up was in substance that there had been for many years a road leading through the racecourse reserve, and that that road had by long usage become dedicated as a public highway. In the present case there was no doubt that this road had been used for many years. It was not a road surveyed, or of any definite width, but it was a track that led through the land. Whether it had been dedicated as a highway, or whether a road could be dedicated by mere user under such circumstances, were interesting questions; but, at any rate, there was no doubt that under these

circumstances a man might honestly believe that such a right did exist. In my opinion, a *bond fide* claim of right to use a highway is a sufficient claim of right to oust the jurisdiction of the justices. If it were a frivolous claim, the justices would probably not be bound to stay their hands. But I do not think that the justices had any evidence before them to suggest that the claim of right set up was not *bond fide*. I therefore think that the conviction ought not to have been made, and that the rule must be made absolute. On the question of the admissibility of evidence, not having heard argument on both sides, I express no opinion.

HARDING, J.: I agree with the learned Chief Justice in his opinion that reasonable evidence of a *bond fide* claim of right-of-way was raised in the case, and upon it being given, the magistrates' jurisdiction was ousted. I think that the rule must be made absolute, also, on the ground that evidence was wrongly admitted. The evidence said to have been wrongly admitted was a map of the *locus in quo*. That was map D, which purported to have been drawn by Frederick Byerley, licensed surveyor, Rockhampton; but Byerley was not called, and so far as that was concerned it was secondary evidence of his having made it. If he had been called, and the plan had been tendered, the proper course for the counsel for the defendant to have followed would have been to ask how it was made up. The surveyor would at once have been bound to say that it was a copy of another map, which itself had been compiled from notes on the field, so that either map would not be primary evidence, and in no case could this map be evidence at all. It was not receivable evidence; and after reading the evidence and listening to the argument, I am of opinion that if I had been deciding the case, the map would have materially affected my judgment. Seeing that the magistrates had visited the *locus in quo* and took the plan with them, I can only infer that it affected their decision. It has been decided by the Court that in a criminal prosecution it is the duty of the judge to keep out illegal evidence,

and that if the case goes to the jury with illegal evidence a conviction will not stand. This evidence was wrongly admitted, and on that ground also the rule ought to be made absolute and with costs.

BEAL, J.: I concur with the judgment of the learned Chief Justice. I express no opinion on the wrongful admission of evidence.

Conviction quashed with costs.

Solicitors for appellant: *Rees R. & S. Jones*.

Solicitors for respondents: *Chambers, Bruce & McNab*.

Re THE WILL OF NARRACOTT, DECEASED.

Will—Administration cum testamento annexo—Executrix outside jurisdiction.

Letters of administration, with probate of the will annexed, may be granted to a person outside the jurisdiction, on the usual sureties being given, where there are no legatees and no creditors in Queensland.

APPLICATION for a grant of letters of administration, with exemplification of probate, of the will of C. S. Narracott, deceased, to A. E. Jaques, a member of the firm of Stephen, Jaques & Stephen, of Sydney, the attorney of the executrix, and to dispense with sureties.

The attorney and all the beneficiaries resided out of Queensland, and there were no creditors in the colony.

HARDING, J., referred the matter to the Full Court.

Feez, in support of the application, cited *Re Hope*, 1 Q.L.J., 11; *Re Tidswell*, *ibid*, 123; *Re Rutherford*, 27th February, 1888; *Re Hicks*, 4 Q.L.J., 39; and *Re Ronny*, 2 Q.L.J., 72.

GRIFFITH, C.J.: It has never been decided by this Court that letters of administration can not be granted to a person out of the jurisdiction. I see no reason why such a grant should not be made in a proper case, and upon the facts this seems to be a proper case; but I think that in such a case sureties ought to be required. There may be some cases where sureties might be dispensed with, but they would be very peculiar cases. I think that in this case letters of

administration may be granted to the attorney of the executrix on proper sureties being found.

HARDING and REAL, JJ., concurred.

Solicitors: *Foxton & Cardew.*

IRVING v. GAGLIARDI.

Customs Duties Act of 1888 (52 Vic., No. 5), ss. 3, 8—Customs Act, 1873 (37 Vic., No. 1), s. 215—Valuation—Fraudulent entries—Forfeiture—Justices Act (50 Vic., No. 17), ss. 209, 210—Wrongful admission of evidence by justices.

An information under sec. 8 of *The Customs Duties Act of 1873* may be laid by the collector of customs.

The mere committal of an act likely to defraud the revenue is a complete offence, without any proof of intention.

The word "offence" in sec. 8 of that Act implies some act contrary to the provisions of the statute.

It is necessary to prove that the goods are undervalued as a fact, and if, in the opinion of the collector of customs such undervaluation was made with the intention of avoiding the payment of duty, the liability accrues.

Justices have power under that Act to forfeit goods exceeding £100 in value.

Held also (Real, J., *dissenting*), where evidence has been wrongfully admitted, a conviction by justices will not necessarily be set aside on that ground if the Court is of opinion there is sufficient other evidence to support a conviction, and that the evidence wrongly admitted did not influence the decision.

ORDER *nisi* calling upon W. H. Irving, collector of customs, and Philip Pincock, P.M., to show cause why a conviction against F. Gagliardi, for breaches of the Customs Acts, should not be quashed, on the grounds (1) that evidence was improperly admitted; (2) that the requirements of sec. 215 of *The Customs Act of 1873* were not complied with; (3) that the police magistrate had no jurisdiction to condemn to forfeiture the goods in respect of which the offence was alleged to have been committed; (4) there was no evidence of undervaluation of the goods according to the value thereof in the principal markets of Italy; (5) there was no evidence of intent.

An information was laid by the collector of customs. It contained six counts—(1) that

on the 27th February, 1894, at Brisbane, seventeen packages of brooms were entered for *ad valorem* duty by G. J. Fitzwalter, the duly authorised agent of F. Gagliardi, one of the importers of the said goods, and that it appeared to the collector of customs that in the invoices of the said goods the same were undervalued for the purpose of avoiding the payment of part of the duty on such goods, whereby the said F. Gagliardi had forfeited the sum of £200; (2) that . . . in the entry of the said goods the same were undervalued, &c.; (3) that, on the date aforesaid, five packages of brooms were entered for *ad valorem* duty, and that the declaration made with regard to the invoice of the said goods was wilfully false, whereby the said F. Gagliardi had forfeited the sum of £200; (4) that . . . the declaration as to the entry was wilfully false, &c; (5) that on the date aforesaid F. Gagliardi did, at Brisbane, wilfully use, when falsified, a certain document purporting to be a bill of lading of certain goods shipped on board the steamship *Salier* from Genoa in Italy, bound for Sydney, the same being an instrument used in the transaction of business relating to customs contrary to sec. 161 of *The Customs Act of 1873*, whereby the said F. Gagliardi had forfeited the sum of £100; (6) that the said seventeen packages had been seized under sec. 8 of *The Customs Duties Act of 1888*, were liable to forfeiture, and claimed by the collector of customs. The defendant was convicted on each of the first four counts, and on each was fined £12 10s., with £4 11s. 6d. costs, in default three months' imprisonment. He was found not guilty on the 5th count, and on the 6th count the goods were forfeited and condemned. The value of the goods forfeited was £145 ls.

Byrnes, A.G., and *Power* for the respondent; *Rutledge* for the appellant.

GRIFFITH, C.J.: This was an appeal to the Court, under the 209th section of *The Justices Act*, against the decision of the police magistrate of Brisbane upon charges made under the 8th section of *The Customs Duties Act of 1888*, the information being laid by the collector of customs. Various

objections have been taken to the decision, and the matter has been very fully argued, and ably argued, and I have derived very great assistance from the argument. Several objections have been raised, and in the view I take of the case, it was necessary to advert to all of them. The first point in logical order was an objection to the information, as being laid by the wrong person. It was laid by the collector of customs. Whether that objection was tenable or not depends upon the construction of the 215th section of *The Customs Regulations Act of 1878*, which provides: "All penalties and forfeitures imposed by this Act or any other Act relating to the customs or to trade or navigation shall, unless other provision be made for the recovery thereof, be sued for, prosecuted, and recovered in the name of Her Majesty's Attorney-General or Solicitor-General, or in the name or names of some officer or officers of customs, or other person or persons thereunto authorised by the Governor-in-Council, either expressly or by general regulation or order, and by no other party." It was contended that the words "authorised by the Governor-in-Council" governed the whole of the words after "Her Majesty's Attorney-General or Solicitor-General." That is a possible grammatical construction of the sentence, but the effect of it would be to give no meaning to the words, "some officer or officers of customs." On that construction, the section would have precisely the same effect if those words were omitted. That would be a reason for not adopting that construction, because if possible a meaning should be given to every word of the section. On referring to the previous law on the subject for the purpose of seeing what alterations the Legislature has made, and inferring from that its intention, I find that, under the Act of 1845 (9 Vic., No. 15), s. 108, which was in force before the Act of 1878, prosecutions for penalties and forfeitures incurred for breaches of the customs laws might be commenced in the name of the Attorney-General, or in the name or names of some officer or officers of Her Majesty's customs. They were the only persons who could

sue. Then we find that the Legislature, finding the class of persons entitled to sue thus limited, has added, in the Act of 1873, the words, "or other person or persons thereunto authorised by the Governor-in-Council, either expressly or by general regulation or order, and by no other party." I think the inference is very strong, that the intention was not to reduce but to increase the number of persons who could sue; and, considering the conditions of the colony at that time, and the number of places out of communication with Brisbane except by long course of post, I think it is highly improbable that it was intended to take away from the officers of customs a power which they then had, and which was necessary in order that infringements of the Customs Acts might be dealt with speedily. I think, therefore, that that objection fails. The next objections depend on the construction of the 8th section of *The Customs Act of 1888*, and two distinct questions arise on that section. The counts of the information to which the first question relates were the first and second. The 8th section provides: "If any package entered for duty is found to contain goods not mentioned in the entry or invoice, or if any goods are found which do not correspond with the description thereof in the invoice, and such omission or non-correspondence shall appear to the collector of customs to have been made for the purpose of avoiding the payment of the duty or any part of the duty on such goods, or if it shall appear to the collector of customs that in any invoice or entry any goods entered for *ad valorem* duty have been undervalued with such intent as aforesaid, or if the oath or declaration made with regard to any such invoice or entry is wilfully false in any particular, then, in any of the cases aforesaid, all the packages or goods included or pretended to be included, or which ought to have been included, in such invoice or entry shall be forfeited, and the importer of the same shall, for every such offence forfeit and pay a sum not to exceed £200 or less than £10, to be recovered before any two or

more justices of the peace sitting in petty sessions in the district where such offence to be tried shall be alleged to have been committed." In construing that section, reference should be made, I think, to the preceding provisions of the Act. I think also that as that section was a re-enactment in identical words of the 8th section of an Act passed in 1870, it should be construed exactly in the same way as that section. The Legislature repeated exactly the same provisions in the same words, and they must I think be taken to have intended to express the same idea. The Act of 1870 provided for the first time in the colony for the imposition of duties according to the value of the goods imported; and for that purpose it became necessary to ascertain the value of the goods. The Act naturally began by laying down certain rules and procedure for ascertaining the value. The importer was required to produce the genuine invoice, and verify it; and if any question arose whether the value as stated was true, provision was made for inquiring as to the true value. It is quite clear from that part of the Act, though it does not say so in so many words, that an obligation is imposed on the importer to value the goods truly. To undervalue them is, if not a breach of the express words of the preceding sections, a breach of the duty which is manifestly imposed upon him. Bearing that in mind, I pass to the 8th section. The first provision of that section deals with the case of goods or packages not mentioned in the invoice, in which case, if they went undiscovered, payment of duties would be evaded, and with the case of goods being found which do not correspond with the description in the invoice, in which case also payment of the proper duties might be evaded. In construing these provisions, it is necessary to remember that it is the general scheme of Customs and Revenue Acts to make an offence consist in the mere doing of an act without regard to the intention of the person who does it. A very good illustration of this may be found in the 88th section of *The Customs Act of 1873*, which provides that if any goods are removed from

any ship, quay, wharf, or other place previous to the examination thereof by the proper officer, unless under the care and authority of such officer, they shall be forfeited; and further, that if any goods entered to be warehoused are carried into the warehouse, unless with the authority or under the care of the proper officer, and in such manner, by such persons, within such time, and by such roads or ways, as such officer may direct, they shall be forfeited. If a man were directed to take the goods down Queen Street, but took them down Adelaide Street, they would be liable to be forfeited. The same result would follow if they were landed previous to examination, unless under the authority of the proper officer. It has been said that under that section there is scarcely a man who lands with his portmanteau from a steamer who does not run the risk of having it forfeited. It is clearly the scheme of these laws to make the mere committal of an act which is likely to defraud the revenue a complete offence without any proof of intention. Construing section 8 in that light, it would appear that the first branch of it, so far from being a hard provision, is less hard than one would expect to find in a Customs Act, for it mitigates the severity which might have been looked for of making forfeiture and penalty follow on the mere inclusion of a package not mentioned in the invoice, or the mere misdescription of goods in the invoice, by requiring that, in addition to those facts, which in themselves would be sufficient if not discovered to cause an evasion of duty, the collector of customs must be satisfied that the act was done for the purpose of avoiding the payment of duty. I turn to the next branch of the section, which reads: "Or if it shall appear to the collector of customs that in any invoice or entry any goods entered for *ad valorem* duties have been undervalued with such intent as aforesaid." I have called attention to the fact that the goods must be valued, and that it is clearly the duty of the importer to value them correctly, and that undervaluation would be an improper act. The section, having used those

words, goes on: "All the packages and goods included or pretended to be included or which ought to have been included in such invoice or entry shall be forfeited, and the importer of the same shall, for every such offence, forfeit and pay," &c. I adopt Mr. Rutledge's argument, that the word "offence" necessarily implies some act done contrary to the provisions of the Act, and is not an apt word to describe a mere conclusion arrived at by the collector. And, as undervaluation is clearly a contravention of the Act, I think that the necessary inference is that there must be an undervaluation in point of fact as well as the opinion of the collector of customs that the undervaluation was made with intent to avoid the payment of duty. It was contended for the Crown that the opinion of the collector was conclusive, both as to the undervaluation and as to the intent; but I think that the construction which I have adopted, and which is exactly in keeping with the first branch of the section, is the true one, and that it is necessary to prove that the goods were undervalued in fact, and that the undervaluation was in the opinion of the collector of customs made for the purpose of avoiding the payment of duty. The sixth count, claiming forfeiture of the goods, raises a second question on the construction of the 8th section, namely, whether under the section justices have power to declare a forfeiture of goods exceeding £100 in value. My opinion on this point has fluctuated a good deal during the argument, but I have arrived at a conclusion which appears to me to be supported by satisfactory reasons. It is a general principle that, when a statute creates a new offence, prohibiting something which was lawful before, and appointing a specific remedy against such new offence by a particular mode of procedure, that particular method must be pursued, and no other. Now, going back to the year 1870, when the Act was first passed, we find that the statute created a new offence, the consequences of which were to be forfeiture of goods and a pecuniary penalty. It then used the words, "to be recovered before any two or more justices of

the peace sitting in petty sessions in the district where such offence to be tried shall be alleged to have been committed." The venue was expressly and for the first time made local. *Prima facie*, the inference to be drawn was, that justices sitting in the place where the offence was committed were to have exclusive jurisdiction to deal with the offence. There is no apparent reason why the justices dealing with the facts for the purpose of the penalty (forfeiture following as a matter of course without any discretion on their part) should not deal as well with the forfeiture. The word "recovered" is an apt word to use in speaking of a forfeiture. I do not see, applying the rule that I have mentioned—this statute creating a new offence and providing a special tribunal to deal with it—why the words I have quoted should be limited to one branch of the consequence of the offence and not extend to both, if the words admit of that construction. It is clear that *The Act of 1870*, which created the new offence and appointed a special tribunal to deal with it, extended the jurisdiction of that tribunal to some extent. Under the previous law (13 Vic., No. 43, s. 8), the jurisdiction of justices in customs cases was limited to cases in which the amount of the penalty or the value of the goods forfeited did not exceed £100. The limit was the same in both cases. *The Act of 1870* expressly extended the limit as to penalty to £200. Was it to be inferred that so far as regards forfeiture it remained limited to goods not exceeding £100 in value, or were the justices to have all the jurisdiction which might be necessary to give effect to the provisions of the section? The sentence is clearly elliptical. Some words must be supplied before "to be" recovered. Are they, "such forfeitures and penalty," or "such penalty" only? On the whole, as the previous jurisdiction was altered and a special tribunal appointed, I think that the intention of the Legislature is sufficiently clearly shown that the tribunal was to deal with all the matters that arose under the section. I entertain, indeed, some doubt whether the words of the section, as

they stand in *The Act of 1888*, do not, so far as regards proceedings for a breach of that section, exclude the general provisions of *The Act of 1873*, allowing proceedings to be taken in the Supreme Court or District Court; but, for the reasons I have given, I think the justices had jurisdiction to entertain the question of forfeiture although the value of the goods exceeded £100. It was also objected, that there was no evidence of undervaluation of the goods in fact, *i.e.*, no evidence of their actual value in the principal markets of the country of export, which, by the statute, is to be the value for the purpose of *ad valorem* duty; and further, that there was no evidence that the undervaluation, if any, was made with intent to avoid payment of duty. On the latter point, I think that the opinion of the collector is all that need be proved, and that it was sufficiently proved by his laying the complaint which recited it. As to the value in the markets of Italy, from which country the goods were exported, I think that the fact that the appellant had put forward invoices purporting to be made out at Genoa was, even without the general knowledge that the Court had as to the ports of Italy, sufficient evidence as against him, that the value at Genoa was a true test of the value in the markets of Italy. The next objection was that evidence had been wrongly admitted. This objection, on my view of the construction of the Act, applies to all the counts except the third, which charged that the declaration with regard to the invoice was wilfully false. There is no doubt that that charge is proved irrespective of the value of the goods, for the invoice was admittedly not the genuine invoice from Genoa, but was made out in Sydney. The objection applied to two pieces of evidence. One was the evidence of Mr. James Honeyman, inspector of invoices, who had held that office for about twenty years. The objection taken was, that Mr. Honeyman was not an importer of goods. Mr. Honeyman's evidence on the point of the value of the goods was clearly in the nature of expert or opinion evidence; but so is that of any other man on a question of value. Opinion

evidence, as it is called, is a statement of the result of the observation of voluminous facts which cannot themselves be conveniently given in evidence in detail. It is necessary that the person who gives such evidence should be a person before whose observation these numerous facts have come. The conclusion being one to be drawn from a number of transactions that have taken place between other persons, it can not make any difference whether those transactions took place verbally or through the medium of written documents, nor does it matter how they came under his notice. For that reason a clerk in a merchant's office through whose hands all the negotiations relating to a particular branch of trade went would be just as good a witness as to values, and, as to the course of dealing disclosed by the documents, as one of the principals himself, and very likely a better. Applying that principle to Honeyman's evidence, it was admissible; the weight of it would be for the tribunal before which it was given. The objection to the other piece of evidence raised a much more difficult question. In the course of cross-examination, one of the witnesses for the prosecution was asked about a conversation with a Mr. Millingen, and he gave some information as to that conversation. In re-examination, he was asked to give evidence as to a statement made by Mr. Millingen. It did not appear very clear whether that statement was made in the same conversation or not. The witness had had two conversations with him. The objection was, that the evidence in re-examination must be confined to the conversation referred to in the cross-examination. Whether effect was given to that objection or whether it was not does not clearly appear. I will assume for the purpose of the rest of my judgment that it was not, in which case the evidence was inadmissible and wrongly received. What are the consequences? This proceeding is taken under the 209th section of *The Justices Act*, which provides: "If any person feels aggrieved by a conviction or order of justices, he may apply to the Supreme Court or judge thereof, in chambers

or in circuit, for an order calling on the justices and the prosecutor or other party interested in maintaining the conviction or order to show cause why such conviction or order should not be quashed, which order may be made returnable on any day on which the Full Court is appointed to sit." The next section provides, that after inquiry into the matter and consideration of the evidence adduced before the justices, the court, if it thinks the conviction or order can not be supported, may direct it to be quashed, and may make such further order in the premises as is just and the circumstances require. It is well known that those provisions of *The Justices Act* were taken from an Act of the colony of New South Wales, passed there in 1850, which instituted a proceeding called a statutory prohibition. That Act—14 Vic., No. 43—was introduced when Sir John Jervois' Acts were introduced, and was passed at the same time. That Act, adopting the English Justices Acts, recited in section 9: "And whereas it would greatly tend to the advancement of justice in respect of matters within the summary jurisdiction of justices of the peace and to the protection of justices in the exercise of their jurisdiction, especially from actions brought against them for or in respect of errors of judgment merely, if power were given to the Supreme Court in certain cases to amend defects of form or mistakes not affecting the substantial merits in the proceedings of such justices; and on the other hand, if the means of obtaining summary relief were afforded against the summary convictions or order of justices." And, for the purpose of giving effect to those objects, provisions were made which are now found in the 209th and 210th sections of *The Justices Act of 1886*. Very early after the passing of the Act of 1850, a question arose as to the principle on which the court should act in giving relief. Mr. Rutledge has contended in effect that the principles upon which we are bound to act are the same as are applicable in deciding a Crown case reserved; and that, if there appears on the proceedings anything which if it had been left to a jury

would have required the court sitting as a court of appeal in a criminal case to quash the conviction, we are bound to give the same relief under this Act. I do not accept that view. It was argued for the Crown that the provisions of O. XXXI, r. 2, of the Crown Rules applied to proceedings by way of appeal under this section. It is, I think, unnecessary to decide whether the rule formally applies or not. But I think that without this rule the principle expressed in it ought to be applied in dealing with such cases. In a case that arose in 1858, before separation, Stephen, C.J., said: "We entertain no doubt, having regard to the enactments which have given the remedy by prohibition, that it is our duty, before holding any conviction by a magistrate to be erroneous, to look at and consider the whole of the evidence which was before him. In cases tried by jury, the court has ordinarily no jurisdiction to determine facts. If improper evidence be admitted on the trial, the course is to set aside the verdict; for it *may* have been founded, whatever the force of other testimony in the case, on the very matter which ought not to have been before the jury. In cases of this kind, however, the court sits as a tribunal of appeal, with the double province assigned to it of deciding on the facts as well as the law." (*Es parte Ward*, Wilkinson, p. 17, note). That decision is certainly entitled to very great weight. The same learned judge said in another case shortly afterwards: "This case falls within the exception from the general rule so often stated by the court on prohibition motions—namely, that it becomes our duty to interpose (but then only) where we see clearly and without doubt that the convicting justices are wrong." If the rule stated there is the correct one, the court is not bound to quash a conviction merely because erroneous evidence had been admitted, any more than under the present practice the court is bound to grant a new trial in a civil action because evidence has been erroneously admitted. I think that the court is not bound, if it thinks that a mere technical error has been committed, to quash a

conviction, but should exercise its authority more freely, with a view of doing substantial justice, than giving effect to objections not going to the merits. This principle should, I think, be applied especially in a case where, as in the present, there was an appeal to the District Court. In the present case three courses were open to the appellant: He might have appealed to the District Court, in which case, unless otherwise ordered, the matter would have been reheard on the original evidence, but the inadmissible evidence would have been rejected from consideration by the District Court judge. If this course had been taken, the objection would have availed nothing. Or, the appellant might have appealed to this Court by special case, in which event the Court might have sent the matter back for a new trial. The third alternative was the one he has adopted. If the Court on that application is bound to give effect to the objection, the remarkable result would follow that an appellant, by his choice of the form of appeal, can prescribe to the Court the principles on which the appeal should be dealt with and the nature of the relief to be given; in effect, compel the Court to give effect to an objection which would not have been open if he had adopted another form of appeal. I think that the rule laid down by Sir Alfred Stephen in 1858 is the true rule which should guide the Court in dealing with appeals of this sort. If that is so, the Court ought not to quash the conviction unless they think that it was clearly wrong. Can we say that the conviction was wrong merely because this evidence was wrongly admitted? or, even, that it was reasonably probable that that bit of evidence affected the result? If I could see that it was reasonably probable that that evidence had influenced the decision, I should be disposed very easily to take the further step of holding that it had in fact influenced the decision, and, therefore, that the conviction was wrong; but I think it was highly improbable. The case was tried before a very experienced and careful magistrate (although, perhaps, that circumstance was not material), and

there was abundant evidence, without that objected to, of the appellant's guilt. I can not see that it was in the least degree probable that any substantial injustice has been done by the admission of the evidence. I think, therefore, that even if the evidence was wrongly received, that is not a sufficient ground for quashing the conviction. For these reasons, I think that the appeal fails on all points, and that the rule should be discharged with costs.

HARDING, J.: The first ground on which the rule was granted was "that evidence was improperly admitted." In support of that, our attention has been directed to the evidence of W. H. Irving, that in a conversation with a Mr. Millingen he said that he was certain these brooms had been undervalued, and to the evidence of James Honeyman, who said "that the price of the brooms free on board at Genoa would be about 7s., 5s. 6d., and 4s. 9d. respectively." Taking that piece of evidence first, it appeared that Honeyman was a sufficiently skilled witness to give evidence as to those prices at Genoa. That being so, he gave evidence of the value of the goods at the market whence the goods were actually imported. That satisfied sec. 3 of *The Customs Act of 1888*. As to the first piece of evidence, a doubt had been raised as to whether C.O. XXXI applied to criminal cases on the Crown side of the court. If it did, the objection failed, as no substantial wrong or miscarriage had been occasioned by its admission in the court below, and there was ample evidence to maintain the necessary findings without it. The Court is sitting as a court of appeal from the justices, and will do on the appeal what the justices should—and what they might be assumed to have done in the hearing before them—namely, reject from their consideration the evidence wrongly admitted, and, as there was ample evidence without it, will uphold the conviction on the undoubted good evidence alone. I hold that the rule must be discharged with costs.

REAL, J. (after reciting the facts), said: The evidence as to the alleged breaches seems to me

Practice, p. 84; *Purcell v. Meston*, 5 Q.L.J., 118; *Mellor v. Swire*, 30 Ch.D., 239.

Power, for defendant, cited *Queensland Investment Co. v. Grimley*, 4 Q.L.J., Supp. 3; *Cain v. Cain*, 1 Q.L.J., 122; *Tuckett v. Blake*, 14 V.L.R., 264.

C.A.V.

GRIFFITH, C.J.: When an order is made *ex parte*, the court or judge making it may, upon application of any person prejudicially affected by the order, review and, if necessary, discharge it. This is a rule of natural justice. But, when a judgment or order is pronounced or made after hearing both sides, it is a general rule that the court which pronounced the judgment or made the order cannot reverse or vary it. To this rule, which in my opinion applies equally to all judgments and orders, whether final or interlocutory, and whether pronounced by the Full Court or by a single judge, and whether he is sitting in court or in chambers, there were, before the Judicature Acts, some exceptions.

The judges of the Court of Chancery, and I suppose the judges of this Court exercising its Equity jurisdiction, had authority to rehear a case under certain circumstances and under conditions which were regulated by the practice of the Court. A Chancery judge sitting in court had power to review and discharge an order made by himself in chambers, and the judges of this Court, in the exercise of their Equity jurisdiction, had, I suppose, similar power. Power to review, rescind, or vary an order is expressly conferred by statute on this Court in the exercise of its insolvency jurisdiction. But, with these exceptions, I do not know of any case in which a judge had power to review or alter his own decision when once perfected. The practice relating to rehearing in Chancery, and on the Equity side of this Court, was abolished by the *Judicature Acts* (*Re St. Nazaire Co.*, 12 Ch.D., 88). The powers of a judge of the Chancery Division to review in court a decision given by himself in chambers is preserved by sec. 50 of the English *Judicature Act of 1873*, but the provisions of sec. 10 of the

Queensland Judicature Act are, in my opinion, for reasons analogous to those set forth in the case just cited, inconsistent with the retention of such a power by a judge of this Court. In my judgment, therefore, the general rule applies to all decisions of this Court by whomsoever the jurisdiction is exercised, unless where some statutory provision exists to the contrary, or where the alleged error in the judgment or order is not that of the court or judge, but is made by the officers of the court in formulating the decision. And this rule, if not one of natural justice, is a rule of manifest convenience. If a decision is objected to on the ground that it is erroneous, *i.e.*, that it ought not to have been given, the objection must be made before the proper court of appeal, if any. If no appeal is given by law the decision, although erroneous, must stand.

But although a judgment or order stands unimpeached and unimpeachable, it does not follow that it ought under all circumstances to be carried into execution. At Common Law, if after final judgment had been given in an action new facts arose entitling the defendant to be relieved from execution upon the judgment, he could obtain that relief by a proceeding called a writ of *audita querela*. Similar relief was given in Chancery by a bill in the nature of a bill of review. Afterwards it became the practice in the courts of Common Law to interfere in a summary way on motion in all cases in which the party would be entitled to relief on a writ of *audita querela*. (Per Eyre, C.J., in *Lister v. Mundell*, 1 B. & P., 427.) The proceeding by *audita querela* is now abolished, but similar relief may be obtained after judgment upon the ground of facts which have arisen or have been discovered too late to be pleaded. (Order XLI, r. 22.) And if they have arisen after a decision which is appealed from, and before the hearing of the appeal, they may be brought before the court of appeal as of right. (Order LVII, r. 11.) Thus, although the mode of procedure is altered, full power is retained to relieve a party from the effect of a judgment which, though just when pronounced, ought not

to be carried into execution. The same principle that allows relief to be given against the continued operation of a final judgment obviously extends also to giving relief against the continued operation of an interlocutory order, if after it is made new facts come into existence or are discovered which render its enforcement unjust. Such a contingency is plainly much more likely to arise in the case of an interlocutory order than in that of a final judgment. In my opinion, it is the settled practice of the Court to exercise the power of giving relief in such cases. An application for such relief is not in the nature of an appeal or rehearing; each of these is founded on the contention that the order appealed from ought not to have been made. An application for a new order which has the effect of suspending in whole or in part the operation of a previous order starts with the assumption that that order was rightly made. There is therefore no question of reversing or varying or rehearing the original decision or order. It follows that the application for relief from it need not be made to the court or judge by whom the original order was made, but may be made to any judge who can exercise the jurisdiction of the court, although it would ordinarily be made to the same court or judge; and the relief may be granted by a judge in chambers (if it is a proper case for chambers) although the original order was made by the Full Court—whether on appeal or otherwise. If it should turn out that the application is based upon the assumption that the order, the operation of which it is desired to modify, was wrongly made, it must fail. The only question is whether the party applying is entitled under the altered circumstances to be relieved from the operation of the order.

Applying those principles to the present case, it appears that the order of Keal, J., of 20th June, was rightly made, but that according to the practice of the Court, the plaintiff, having returned within the jurisdiction, is entitled to be relieved from its operation. (*Redondo v. Ohaytor*, 4 Q.B.D., 453; *Ross v. Green*, 10 Ex., 891; *Place v.*

Campbell, 6 D. & L., 113; *O'Connor v. Sierra Nevada Co.*, 24 Beav., 435). The substantial result will be the same as if the order were discharged. Perhaps a more accurate form of expressing the result would be to order that the plaintiff be discharged from the obligation to give security for costs imposed by that order. (Per Brett, J., in *Westenberg v. Mortimore*, L.R., 10 C.P., 438). The plaintiff must, as indeed is conceded, pay the costs of this application.

HARDING and REAL, JJ., concurred.

Solicitors for plaintiff: *H. B. Lilley & Cowlishaw*.

Solicitor for defendant: *J. Howard Gill*, Crown Solicitor.

REGINA v. WHELAN.

Quashing order—Arresting constable—Costs.

On an application to quash a conviction by justices, costs will not be given against a police constable who has only done his duty in arresting the defendants, and has not supported the conviction.

ORDER *nisi*, calling upon C. B. Wiggins and Walter A. Cross, justices of the peace, and Arthur Lowe, police constable at Gatton, to show cause why the conviction of Thomas Ingham and Nicholas Whelan, on the charge of stealing timber, should not be quashed, on the grounds (1) that the justices making the decision were not present and acting together during the whole of the hearing and determination of the proceedings, as required by sec. 29 of *The Justices Act of 1886*; (2) that the justices unlawfully refused an application by the appellants for an adjournment for the purpose of calling evidence on their behalf; (3) that the complaint or charge disclosed no offence; (4) that there was no evidence to support the conviction; (5) that the justices had no jurisdiction to convict, as the property alleged to have been stolen exceeds in value the sum of 40s.; (6) that sec. 184 of *The Justices Act of 1886* was not complied with. The appellants were arrested by Constable Lowe on 25th July, on a charge of having stolen certain timber from a paddock

belonging to the Hon. W. Vanneck. On the way to the lockup, Thomas Griffith, their employer, told the constable that he had instructed them to take the timber, and if anyone was guilty he was. He repeated that statement before the justices, who after hearing evidence ordered each of the defendants to pay a fine of £3, or in default one month's imprisonment.

Byrnes, A.G., and *Power* offered no objection to the rule being made absolute, but appeared to oppose an application for costs against *Lowe*.

Lukin applied for costs against the latter.

GRIFFITH, C.J.: It is not disputed that the rule must be made absolute to quash the conviction. The appellants ask that the costs of the appeal should be paid by the respondent *Lowe*. Now, the respondent's concern in the matter was merely that he was a constable, who found the appellants under circumstances which reasonably gave rise to the opinion that they were committing an offence for which they could be lawfully arrested. He therefore arrested them and took them before magistrates. He had nothing more to do with the case, and, so far, he was merely doing his duty. He was not even exercising an option. He merely did his duty, as he was bound to do, and he committed no error or fault of any kind. The conviction must be quashed on grounds quite irrespective of anything that he did. Why, then, should he pay the costs of the appeal? In many cases constables have been ordered to pay the costs of a successful appeal, but they were all cases in which they subsequently adopted and attempted to support the mistakes of others, and on the same principle the Crown has been visited with costs. That the constable has not done in this case, and on no principle of justice could he be made to pay the costs. The rule will, therefore, be made absolute without costs.

HARDING, J.: I am of the same opinion, though I have done all I could to form a different conclusion. What has made me endeavour to find reasons for the opposite decision is this: If the Crown had appeared to support the conviction, and failed, they might have had to pay costs. The

Attorney-General and Mr. Power, instead of appearing for the Crown, had ingeniously evaded such a consequence, by allowing the conviction to go, and only appearing for the constable on the question of costs. Consequently it seems to me that the facts of this case show a position in which, if it were possible, they ought to give the appellants some relief. They had been wrongfully convicted, and in order to get that wrongful conviction out of the way, they had been compelled to come before the court, and now had to pay the costs of doing so.

REAL, J.: I am also of the opinion that the rule ought to be made absolute without costs. At the same time I sympathise with the principle which has been enunciated by Mr. Justice Harding, that it is hard on a man who has been wrongfully convicted, and whose conviction was not supported by the Crown, not to be able to get some relief in the matter of costs when he appealed to the court to quash the conviction. It is hard; but there are many hard cases, and the hardship of one man can not be remedied by doing an injustice to another. Perhaps some remedy for it might be provided in the future.

Solicitors for appellant: *Morris & Heiner*.

Solicitor for respondent: *J. Howard Gill*,
Crown Solicitor.

SEPTEMBER SITTINGS OF THE FULL COURT.

RAVEN v. BURNETT.

Liability of justices—Justices Act (50 Vic., No 17), s. 252—Excess of jurisdiction—Proof of injury.

Justices are not liable to an action for an act done in a judicial proceeding, even if they exercise their jurisdiction improperly, unless some injury has been done, and such injury must be alleged and proved. The principles covering the liability of justices for acts done in excess of jurisdiction, or when jurisdiction is ousted by interest or otherwise, discussed.

DEMURREER.

The facts are fully stated in the judgment of the Chief Justice.

Perské for the plaintiff; *Byrnes, A.G.*, and *Shand* for the defendant.

GRIFFITH, C.J., delivered judgment: These consolidated actions are brought by the plaintiff against the defendants to recover damages in respect of a judgment given by the defendants upon the hearing of an action brought by the Cleveland Divisional Board, in the Court of Petty Sessions at Cleveland, against the plaintiff for the recovery of £6 18s. 6d., for rates claimed to be due to the Board. The statement of claim alleges that the defendants are justices for the colony of Queensland, but that they had no jurisdiction to entertain or determine the action for the reasons (1) that they were interested as ratepayers of the division, and, in the case of one of them, as the paid officer of the Board; (2) that the rates sued for were for a period extending beyond three years; (3) that a question of title arose at the hearing. It also alleges that the present plaintiff objected at the hearing to the defendants' jurisdiction on the ground that they were interested, but it is not expressly alleged that the nature of the interest was brought to their notice. It is further alleged that a prohibition was granted by this Court against proceeding on the judgment, and that the Board, the plaintiff in the Court of Petty Sessions, were ordered to pay part of the costs of the proceedings for prohibition. The defendants contend that the statement of claim discloses no cause of action, inasmuch as it is not alleged that the judgment has been enforced against the present plaintiff, or that anything has been done under it to his prejudice; and further, that it appears by the statement of claim that the subject matter of the action was within the jurisdiction of the defendants as justices, and that they are not alleged to have acted maliciously or without reasonable and probable cause. An action lies in all cases when a person has sustained a temporal loss or damage by the wrong of another (Com. Dig. Action on the case, A). Assuming that the act of the defendants in adjudicating on the case was wrongful, what temporal loss or damage has the plaintiff sustained by it? It is

contended on his behalf that he has been put to expense in obtaining the prohibition. But, in my opinion, the costs of a proceeding in a court which has authority to give costs to the successful party, but does not do so, cannot be recovered in a separate action (*Loton v. Devereux*, 3 B. & Ad., 343; *Jenkins v. Beddulph*, 4 Bing., 160). In the present case it is averred that this Court awarded part of the plaintiff's costs of the proceedings for a prohibition against the Cleveland Divisional Board. The present defendants were necessarily parties to the proceedings, and this Court might in its discretion have awarded costs against them, but did not do so, nor did it direct that all the plaintiff's costs should be paid by the Board. If the plaintiff could recover in an action the costs which this Court did not think fit to give him, the discretion of this Court would be reviewed by a jury. If the plaintiff had been directed to declare in prohibition he might have recovered in that proceeding any damages to which he was entitled (*Interdict Act*, sec. 60). But those damages would not have included his costs in the court below (*White v. Slade*, 32 L.J., C.P. 1). And there is no instance of a separate action ever having been brought to recover such costs. I am of opinion that the plaintiff cannot in this action recover any costs incurred by him by reason of the judgment complained of. If any damages are recoverable, they are nominal only. But I think that actual damage or "temporal loss" is essential to the maintenance of an action in respect of unauthorised legal proceedings (*Barton v. Bricknell*, 13 Q.B., 398; *Tancred v. Allgood*, 28 L.J., Ex. 362), and that, as it does not appear that any actual damage recoverable in an action has been sustained by the plaintiff by reason of the judgment complained of, the action fails on this ground. Assuming, however, that the plaintiff would be entitled to nominal damages in respect of the mere pronouncing of the judgment against him if the action is otherwise maintainable, I proceed to consider whether the facts alleged disclose a cause of action. A court of petty sessions exercising jurisdiction under

The Small Debts Court Act of 1867 is an inferior court of record (sec. 3), and justices acting as judges of that court are entitled to all the immunities and subject to all the liabilities of judges of such courts. The judgment of an inferior court is effectual only when the court had jurisdiction to pronounce it. The words of sec. 252 of *The Justices Act, 1886*, "Any person injured by an act done by a justice in a matter of which by law he has not jurisdiction, or in which he has exceeded his jurisdiction, may maintain an action against such justice," whether that section applies to acts done by justices as judges of a court of record under *The Small Debts Act* or not, do not in my opinion lay down any new rule of law, but merely formulate a principle which is applicable to all judges of inferior courts. The further provisions of the section qualify, in relief of justices, the application of the general rule. In order to establish the jurisdiction of an inferior court it must be shown that the court had cognisance of the subject matter of the action, both as to amount and kind, had authority to call the defendant before it, and had authority to make an adjudication of the kind it purported to make. If either of these three elements is wanting, the judgment is ineffective and cannot be pleaded, even against the party who obtains it (*Briscoe v. Stephens*, 2 Bing., 218). A plaintiff executing the process of an inferior court in a matter beyond its jurisdiction is liable to an action, whether he knew of the defect or not. And judges and officers of the court are liable if they know of the defect (per Willis, J., in *Mayor of London v. Cox*, L.R., 2 H.L., at p. 263). In the case of a judge, the rule is that he is not liable to an action for acting without jurisdiction unless he had knowledge, or means of knowledge of which he ought to have availed himself, of that which constitutes the defect of jurisdiction (*Calder v. Halkett*, 3 Moore, P.C. 28, 58). His liability depends, therefore, upon the facts as they appear to him when the matter comes before him for adjudication, and not as they may afterwards be shown to have existed. But an erroneous, though honest, conclusion on a

matter of law, on which his jurisdiction over the subject matter, or his authority to make the order which he makes, depends, will not protect him (*Houlden v. Smith*, 14 Q.B., 841; *Agnew v. Johnson*, 47 L.J., M.C., 67). Further, the apparent jurisdiction of an inferior court may be ousted, as it is said, by the setting up of a *bond fide* defence which the court is not competent to try; for instance, in most cases, the question of title to land, or by a plea of facts which if true show that the court has no jurisdiction. In these cases the court must inquire for itself whether the defence which the court cannot try is set up *bond fide*, or whether the facts exist which would oust its jurisdiction. Its decision on this point is open to review in a superior court, for an inferior court cannot give itself jurisdiction by an erroneous decision (*Bunbury v. Fuller*, 9 Ex. 111, 23 L.J., Ex. 29). If the court has in fact no jurisdiction, its judgment is ineffective. But the judge is protected under the rule stated in *Calder v. Halkett*, (*ubi sup.*), if he honestly believed in the existence of the facts which if they had existed would have given the court jurisdiction. His error, indeed, occurred in the exercise of a jurisdiction, and in the performance of a duty incumbent upon him—namely, to make the preliminary inquiry whether he had jurisdiction or not (*Somerville v. Mirohouse*, 1 B. & S. 652; *Pease v. Chaytor*, *ib.*, 32 L.J., M.C. 126, 3 B. & S. 620). In all these cases, however, the judgment of the inferior court is void *inter partes*, as being made without jurisdiction. This disposes of the case so far as it depends upon the objection to the jurisdiction of the justices on the grounds that a question of title arose, and that the claims accrued more than three years before the commencement of the action (if that is the true meaning of the allegation), for it is not alleged that upon the facts as they appeared to the justices their jurisdiction was ousted on those grounds. I proceed to consider the objection on the ground of interest. This is an objection which applies equally to all courts, superior and inferior. The judgment of any court may be avoided if it is shown that the judge, or any one of

the judges if more than one, who took part in the decision had a pecuniary interest or any other such substantial interest in the result as to make it likely that he had a real bias. In any such case the judgment of the court may be questioned, and in a proper case set aside by *certiorari* or other appeal, or rendered inoperative by prohibition, or if these remedies are not available by injunction (*Dimes v. Grand Junction Canal Company*, 3 H.L.C., 759, at p. 786). But the objection to a judge on the ground of interest may be waived by the parties (*E. v. Cheltenham Commissioners*, 1 Q.B., 467), and if it is waived he has jurisdiction notwithstanding his interest. Consent, however, cannot confer jurisdiction on an inferior court. Moreover, the judgment of a court which is vitiated by the presence of a judge disqualified by interest is not void, but voidable only. It is valid until set aside (*Dimes v. Grand Junction Canal Company*, *ubi sup.*). It appears to follow that such a judgment is not given without jurisdiction, and that the real objection to it is that it was an improper exercise of an existing jurisdiction, the impropriety consisting not in the nature of the judgment given, but in giving judgment at all instead of declining to exercise jurisdiction. Both the capacity to decline to exercise jurisdiction and the capacity of the parties to remove the need for such declension seem necessarily to involve the existence of jurisdiction. I think, therefore, that in the present case the justices did not act without jurisdiction, notwithstanding that they were interested. Although the cases are numerous in which judgments have been set aside on the ground of interest, I have not been able to find any case in which an action has been brought against judges or justices founded upon this objection. But if such an action will lie it must, in my opinion, be based either on an excess of jurisdiction or on an improper exercise of an existing jurisdiction. I think that the term "excess of jurisdiction" in sec. 252 of *The Justices Act* is intended to describe cases in which a justice who has jurisdiction over the subject matter has done something which he could not,

upon the facts as they appeared to him, have had authority to do (*Ratt v. Parkinson*, 20 L.J., M.C. 208; *Barton v. Bricknell*, *ubi sup.*). This definition does not cover the present case. Assuming that an action will lie under some circumstances against justices for an improper exercise of an existing jurisdiction, 'what are those circumstances? I am of opinion that as large a protection should be afforded to them as in the cases in which their jurisdiction is sought to be ousted by questions of title and the like, and that it should extend to cover errors in law; and that, if they honestly but erroneously come to the conclusion that it is not improper for them to exercise their jurisdiction, they are protected, whether the error is one of law or fact, just as they would be if they had honestly but erroneously come to the conclusion that upon the facts their jurisdiction was not ousted. The reasonableness of this view will appear from the following considerations. It is not necessary that the parties should be aware of the objection at the hearing. The judge himself may be unaware of it or may have forgotten it. The objection may apply to one only of several judges. Yet the objection when taken must prevail, and will vitiate the whole judgment. A judge not himself interested, and who was not informed of the interest of his brother judges, would no doubt be protected by the rule in *Calder v. Halkett*; so, perhaps, a judge who did not know or had forgotten his own interest. But suppose the objection to be taken at the hearing, and the court honestly but erroneously to come to the conclusion that the admitted facts did not in law show a disqualifying interest—a point on which opinions may well differ, as is shown by the recent case of *Leeson v. General Council of Medical Education* (43 Ch.D., 366). If the rule in *Houlden v. Smith* applied, the error being one of law, the judges would all be alike unprotected. I think that this consequence would be manifestly unjust, and that judges are protected whenever the court has jurisdiction over the subject matter and over the defendant, the only question being whether the jurisdiction of the judges is ousted by

the existence of some matter collateral to the merits of the action itself, whether the collateral matter is one of law or fact (see per Cockburn, C.J., in *Pease v. Clayton*, 31 L.J., M.C., p. 6, and *Ackerley v. Parkinson*, 3 M. & S., 411). The statement of claim in the present case does not allege want of *bonâ fides* on the part of the defendants in acting, notwithstanding the objection, even if it is to be taken as alleging that the facts on which the objection was founded were brought to their notice. In the absence of such an allegation I think it is clearly insufficient. Such an allegation might be taken to be equivalent to an allegation of malice and want of reasonable and probable cause, which in sec. 263 of *The Justices Act* seems to be assumed to be sufficient to support an action against justices acting within their jurisdiction. It is possible that the case of a justice perversely exercising his jurisdiction when interested may be an instance in which such an action will lie. Whether, however, such an action will lie against judges of an inferior court of record, even if it will lie against justices, is very doubtful (see *Gelin v. Hall*, 2 H. & N., 379, 27 L.J., M.C. 78; *Fray v. Blackburn*, 3 B. & S., 576; *Scott v. Stansfield*, L.R., 8 Ex., 222, and *Haggard v. Pelicier Frères*, 1892, A.C. 61). In the last-mentioned case, which was an action against a judicial officer, Lord Watson, delivering the opinion of the judicial committee of the Privy Council, said: "The insufficiency or even the utter inadequacy of his reasons for dismissing the suit cannot affect his jurisdiction to dismiss it. He was competent to entertain the question whether the suit ought to be dismissed as vexatious, and equally competent to decide the question one way or another. It is due to the appellant to state that the respondents in their pleadings make no imputation of dishonesty, although their lordships do not mean to suggest that such an imputation, if it had been made and proved, would have deprived him of the immunity which the law accords to a judge in his position. The remedy when such a case does occur does not lie in an action for damages against the offending

judge, but by making a representation to the authorities whose duty it is to see that justice is administered with due care and attention." In the case of judges of inferior courts who act in cases in which they are disqualified by interest, this court has power to visit them with the costs of setting aside their judgment if it thinks that they acted perversely or corruptly. But it is not, I think, consistent with the principles established by the numerous cases to which I have referred to hold that they are liable to an action at law as for acting without jurisdiction, or in excess of jurisdiction, or probably even for a perverse exercise of jurisdiction. For all these reasons, I think that the demurrer must be allowed and that there must be judgment for the defendants.

From this judgment the plaintiff appealed.

HARDING, J.: The damage alleged in the statement of claim is Mr. Pegg's bill of costs, amounting to £74 11s. 10d., the costs of plaintiff defending the original action, and expenses incurred, £7 5s. It also appears that a prohibition order was obtained against the order of the justices on grounds which it is not necessary to refer to; but it was decided that the justices were interested parties. Now, so far as the damages depend upon the costs I have referred to, the judgment of the learned Chief Justice, for the reasons therein given, is doubtless correct, and the statement of claim is not sustainable in respect of that allegation of special damage. It only remains to consider if there was general damage, nominal or otherwise. The question arises on that: Can an action under these circumstances be brought against justices of the peace for what might be got out of it, or merely sustainable for the nominal damages? The facts being as they are in this case, it amounts to this, that this being an action in the Small Debts Court the justices had judicial power. The second section of *The Small Debts Act of 1867* gave them power to hear and determine actions properly brought before them, and they are liable, as all other judges are, if they do any act beyond the limit of their

authority causing injury to another. They are not liable at all for any act done by them in their judicial capacity. That I consider to be the law applicable to them as judges of an inferior court of record. Sec. 252 of *The Justices Act* provides that "any person injured by an act done by a justice in the matter of which by law he has not jurisdiction, or in which he has exceeded his jurisdiction, or by an act done under any conviction or order made or warrant issued by a justice in any such matter, may maintain an action against such justice without alleging in his statement of claim or plaint that the act complained of was done maliciously and without reasonable and probable cause." So that, whether these justices in determining this action acted in their judicial capacity or not, they were covered by the protection of *The Justices Act*, or by the general protection of the law of the land held over all its justices and judicial officers, unless the act resulted in injury to another. That injury, being the gist of the action, must be pleaded and proved, and in order that it may be proved it must first of all be pleaded. In this case no injury was alleged to have occurred to the plaintiff. True, he might have paid the costs, but they were within the jurisdiction of the court in another branch, and they were not subject to revision by a jury. That being so, there is nothing left. What damage was there? I can find nothing, and therefore, however these justices were constituted, I consider they were acting judicially, and that in order that they should be liable to an action, it must be shown that their act has resulted in injury to the plaintiff. The appeal must be dismissed with costs.

COOPER and REAL, JJ., concurred.

Appeal dismissed accordingly with costs.

Solicitor for plaintiff: *Milford*.

Solicitor for defendants: *J. Howard Gill*, Crown Solicitor.

GOULD v. MCNAIRN, *ex parte* MCNAIRN.

Impounding Act of 1863 (27 Vic., No. 22), ss. 36, 39, 40—*Trespass*.

Proceedings may be taken for a penalty for unlawful impounding, under s. 36 of *The Impounding Act of 1863*, against any person who impounds cattle under circumstances under which he is not justified in impounding them under the Act.

Held also (Real, J., *dissenting*), that the Act was intended to be a code of impounding law, and is not confined to a case of trespass where the ownership is undisputed.

ORDER *nisi* to quash a conviction against John McNairn, under sec. 36 of *The Impounding Act*, for having on the 28rd July, 1894, seized and impounded, in the public pound at Enoggera, ten cows belonging to Samuel Gould, of Lutwyche, dairyman. McNairn alleged that the animals were trespassing in his nursery at the corner of the Gympie and Happy Valley roads. The complainant Gould issued a summons against him under *The Impounding Act*, claiming that seven out of the ten cows had not trespassed upon his property, and therefore had been wrongfully impounded. From the evidence before the justices in support of the complaint, it appeared that on the morning in question only three cows trespassed on McNairn's property. The gate was open, and the middle rail of the fence down, so that the cattle could get in. When McNairn discovered the three cows within his boundaries, he drove them out across a green where seven other cows belonging to Gould were browsing, and took the whole of them to the pound. This story McNairn denied. He said that there were seven cows trespassing on his property, and he opened his gate to drive them out. While he was engaged in this way four other cows made their way in. He returned and drove them to where the other animals were standing, and started to drive the whole of them to the pound. On the way he let one of the cows, which belonged to a Mr. Perry, go, and impounded only the ten. The justices, holding that he had acted illegally, imposed a fine of £1, with £2 4s. 2d. costs. Their order was appealed against, on the ground (1) that the in-

formation disclosed no offence under sec. 36 of *The Impounding Act of 1863*; (2) that if the information is under sec. 40 of the Act, no notice of appeal is given under sec. 39 thereof; (3) that there is no evidence in support of the conviction; (4) that if J. McNairn was charged under sec. 36 of the Act, there was wrongful admission of evidence as to damage.

Lukin for the appellant; *Gore-Jones* for the respondent.

GRIFFITH, C.J.: The appellant was convicted and fined 20s. upon a complaint that he had impounded seven cows, under the pretence that they were trespassing upon his land, when in fact they were not trespassing on that land. The first objection taken is that this complaint does not disclose any offence. Sec. 36 of *The Impounding Act of 1863* enacts that any proprietor "who shall impound any animal in any pound or place not authorised by this Act, or in any manner contrary to its provisions," shall be liable to a penalty not exceeding £10, and the question is, whether impounding animals which are not found trespassing is an offence under that section. It is urged in the first place that the word "manner," as used in sec. 36, points to the details of the impounding, and that the offences contemplated are violations of the provisions of the Act regulating the manner of impounding, that in fact the word "contrary" is an adjective qualifying "manner." I think that this contention is not tenable. In my opinion the words "in any manner," which are words commonly found in Acts of Parliament, are an adverbial expression qualifying the word "contrary," and that so far from being words of limitation, they are in this section used in their ordinary adverbial sense as words of extension, perhaps unnecessary, but used to make plain beyond doubt the intention to include all possible cases of acting contrary to the provisions of the Act. The words are, I think, equivalent to "contrary in any manner" or "contrary in any respect." The next question that arises is whether the words "contrary to the provisions of this Act" are to be read as meaning

"contrary to the express provisions of this Act," or as meaning "except in conformity with the provisions of this Act." To answer this question it is necessary to consider the general scope of the Act.

The previous statutory law on the subject of impounding was contained in the Act, 19 Vic., No. 36. That Act did not define or, indeed, refer to the conditions which entitled an owner of land to impound animals trespassing upon it, except in sec. 33, which declared that occupiers of Crown lands, under lease, license, or other lawful authority, should be empowered to impound animals trespassing. This section was apparently intended either to be declaratory or to confer some right not previously existing. That Act made various provisions relating to the mode in which the right of distraining animals *damage feasant* (which it assumed to exist), might be exercised, and conferred jurisdiction upon justices to deal with various matters that might arise in connection with impounding. *The Act of 1863*, however, went further. After providing for the establishment and maintenance of public pounds, it provides (sec. 36) that any proprietor (a term which is defined as including an occupier of land under whatever tenure), upon whose land any animals are found trespassing (1) may drive the animals to the public pound nearest, by a practicable road or highway, from the land where they were trespassing; (2) may on any business day between sunrise and sunset deliver them to the pound-keeper to be impounded; and (3) shall at the same time deliver a written memorandum describing the animals, and specifying the name of their owner, the place where they were trespassing, and the amount of damages claimed. Then follow the penal provisions which I have already quoted. Sec. 37 empowers a proprietor upon whose land any cattle, horses, or sheep (not including, it will be observed, goats and swine, which are included in the term "animals" used in sec. 36), are found trespassing, if he knows the owner, to temporarily impound them in any convenient place for a period not exceeding four days, giving notice

to the owner within 24 hours, and making provision for their maintenance. Sec. 38 empowers a proprietor to send any "animals" found trespassing on his land to a convenient place near the residence of their owner, with a demand for damages. If the owner fails to pay the damages so claimed, the same section empowers justices, upon proof of the trespass, and of the damages being done, and of the owner's default, to order payment of the damages. Sec. 39 provides that when the owner of animals which have been impounded disputes the amount of damages claimed, or the nature of the alleged trespass, or the legality of the impounding, he may either leave the animals in the pound or pay the damages claimed, or the pound fees, and release the animals, giving at the same time notice to the poundkeeper that he intends to appeal against the impounding, or the damages, as the case may be, in which case the poundkeeper is to retain the damages till the question has been decided. Sec. 40 empowers justices, on the complaint of the owner, to inquire into the facts of the trespass, the amount of the damages, and the legality of the impounding, and to adjudge that the damages are legal and proper, or are excessive, or that the impounding was illegal, and to give consequential relief. Sec. 53 makes a judgment or conviction of justices under the Act a bar to any action or complaint for the same cause. The express authority to a proprietor upon whose land animals are found trespassing to impound them, the express authority to deliver them to the poundkeeper on a business day between sunrise and sunset, and the authority to temporarily impound them in any convenient place for a period not exceeding four days, appear for the first time in this Act. I am of opinion that the provisions to which I have referred show that the intention of the Legislature was to provide a sure, summary, expeditious, and inexpensive mode of determining any disputes that might arise with respect to impounding, including disputes as to the fact of trespass, and at the same time to lay down for the guidance of the parties, and of the justices, the

conditions on which alone the right of impounding might be exercised, and that the Act in effect establishes a code of impounding law.

Reading the penal provisions of sec. 86 in this light, I think that the natural construction of the words "contrary to the provisions of this Act" is, except in conformity with them. This view is confirmed by considering the provisions with respect to the days upon which, and hours within which, animals may be delivered to the poundkeeper. It can hardly be contended that delivery to the poundkeeper on a Sunday, or between sunset and sunrise, would not be "contrary to the provisions of the Act" within the meaning of the section, although it contains no express words prohibiting such delivery. If so, those words must, so far as regards the provisions, be held to be equivalent to "except in conformity with the provisions of this Act." And if the words must have that meaning in order to give effect to the provisions of the section, why should they not bear the same meaning with regard to the provision which authorises the impounding of animals "found trespassing"? I see no reason. I am, therefore, of opinion that a proprietor who impounds animals which are not found trespassing on his land, and who clearly, therefore, impounds them otherwise than in conformity with the provisions of the Act, impounds them contrary to its provisions, and is guilty of an offence. I think that it was intended to impose a penalty upon any person who, assuming to exercise the right to place another's animals in the custody of the law in a public pound, acts in violation of the express or implied provisions of the Act. It may be said that this construction makes the words "any proprietor" equivalent to "any person." But I think the answer is that no one but a proprietor can impound. Any other person assuming to do so would be a mere trespasser. The Legislature was dealing only with the case of persons claiming to exercise the rights conferred or declared by the Act, and as no one could procure the admission of animals to a public pound without a statement in writing, specifying the land by virtue of his pro-

prietorship of which he claimed to impound the animals, no one but a proprietor or person who alleged himself to be a proprietor could be said to "impound" within the meaning of the Act. A person who assumed to act in that capacity, and by virtue of it, to place another's property in the custody of the law, could hardly, I think, be heard to deny that he is a "proprietor" for the purpose of escaping the penal provisions attached to a wrongful exercise of the powers conferred on a proprietor. It was immaterial, therefore, whether the word used was "proprietor" or "person." I am, therefore, of opinion that the complaint disclosed an offence against the provisions of sec. 36, and that this objection fails. It is consequently unnecessary to consider the objection, that giving notice to the poundkeeper under sec. 39 is a condition precedent to a right to relief under sec. 40. But I would observe that as that relief may be obtained whether the animals are released (in which case only is a notice of any use) or are left in the pound, it is difficult to see how giving the notice can be a condition precedent to obtaining it.

It was also objected that there was no evidence to support the conviction. The complainant's evidence, standing alone, might, in our view of it, be consistent with the appellant's innocence, but as he himself was called as a witness and negatived that view of the evidence, I think that the justices might reasonably adopt the view which pointed to his guilt. This objection, therefore, also fails.

A further objection was made that evidence of deterioration of the cows, by reason of their impounding, was wrongly admitted. This evidence was, however, clearly irrelevant to the fact of a breach of the provisions of the Act having been committed, and could not have affected the justices' minds on that point. It might have influenced them as to amount of the penalty to be imposed, and I am disposed to think that they were justified in considering it for that purpose; but even if they were not, I do not think that its adoption is a ground for quashing the conviction in this case.

HARDING, J.: If the owner disputes the legality of the impounding, he may, under sec. 39, release the animals, and if he gives notice to the poundkeeper, who may not thereafter pay over the damage. Hence notice is not a condition precedent to the complaint; it only keeps the damage *in medio*. If the owner disputes the impounding, and it appears to be illegal, the justices may, under sec. 40, award compensation. The summons does not ask damages, nor a return of the damages in the poundkeeper's hands or paid over. It would seem, therefore, that the complaint was with the object of the punishment of the impounder under sec. 36, and not for damages. If the animals were trespassing on the proprietor's land, they were rightly impounded under sec. 36. If they were not, they were impounded in a manner contrary to its provisions, as sec. 36 only allows a proprietor, upon whose land any animals are found trespassing, to impound them. The conviction must be affirmed, and the rule discharged with costs.

REAL, J.: It appears to me that, with regard to the question whether impounding animals not found trespassing is an offence under the Act, the section is clear. The words used are "any proprietor impounding." It would be a somewhat forced construction to say that the Legislature meant "any person." An examination of the preceding law leads me to the conclusion that the Legislature, in using the word "proprietor," did so intentionally. It is a very apt expression. The word "proprietor," in my opinion, must be limited under the section to the ownership of the land where the offence is said to have been committed. I do not think the section applies to the case of a mere trespasser, and consider that persons who are mere trespassers are not affected nor protected by sec. 36.

Solicitors for appellant: *O'Shea & O'Shea*.

Solicitors for respondent: *Atthow & Stumm*.

WOODS v. SHERIFF OF QUEENSLAND.

Wrongful arrest—Representations of person arrested—Estoppel—Liability of sheriff—Detention—Reasonable time for inquiry.

A writ of *capias ad respondendum* was issued for the arrest of Alfred Woods. The plaintiff, his brother, on being asked whether he was Alfred Woods, answered in the affirmative. He was then arrested, but after his arrest he told the sheriff he was not the person mentioned in the writ of *capias*, but declined to say who he was. The sheriff then caused inquiries to be made, and the plaintiff was subsequently discharged.

Held (affirming the judgment of Real, J.), that the plaintiff, having represented himself to be Alfred Woods, was estopped from complaining of the arrest. Held further, that under the circumstances the sheriff was justified in detaining him for a reasonable time in order to make inquiries as to his identity, and that as it was not found that the plaintiff was detained for an unreasonable time during such inquiry, judgment must be entered for the defendant.

ACTION by Charles Woods against the sheriff for damages for wrongful arrest and imprisonment on a writ of *ca. re.* to arrest Alfred Woods. The plaintiff and Alfred Woods were brothers, and very like in appearance. The other facts appear in the judgment. The jury awarded the plaintiff £100 damages, but on the findings Real, J., gave judgment for the defendant. The plaintiff appealed.

Lilley, for appellant, contended that as soon as the plaintiff told the sheriff he was not the person named in the warrant, his arrest became illegal, and the sheriff detained him at his peril. He should have made immediate inquiries. (*Dunstan v. Peterson*, 2 C.B.N.S., 495; 26 L.J., C.P., 267.)

Byrnes, A.G., and G. W. Power, for respondent, submitted there was a clear case of estoppel, and that the detention was reasonable under the circumstances.

The judgment of the Court (Griffith, C.J., Harding and Cooper, JJ.) was delivered by

GRIFFITH, C.J.: The appellant, Charles Woods, sues the sheriff for damages for wrongfully arresting him under a warrant of *capias* to arrest Alfred Woods. The sheriff says in defence that the plaintiff represented to him that he was Alfred

Woods, the person against whom the *capias* was issued, and the jury have found as a fact that the plaintiff, being told by the bailiff that he had a warrant for the arrest of Alfred Woods, and being asked if he was Alfred Woods, said that he was. The bailiff thereupon took him into custody. There can be no doubt that under these circumstances he cannot maintain an action for the arrest, which was brought about by his own representations. That is the well-known doctrine of estoppel. That disposes of the action so far as it is based on the arrest. The plaintiff also complains that he was wrongfully detained, inasmuch as that after he was arrested and taken to the sheriff's office he told the sheriff that he was not the person mentioned in the warrant. Both the sheriff and the bailiff then inquired, "Who are you?" and he refused to tell. The sheriff was then in this position: He was bound to arrest Alfred Woods, if he could find him, and if he did not he was liable to an action for damages at the suit of the plaintiff in the action against Alfred Woods. He was not justified in arresting anybody but Alfred Woods, and if he did he was liable to an action at his suit. Here the plaintiff said first that he was Alfred Woods and then that he was not. What was the duty of the sheriff under these circumstances? The plaintiff having made contradictory statements, the sheriff was not bound to believe his second statement, which was in his own favour, but his duty was to make inquiries to satisfy himself which of the plaintiff's two statements was true, and I think he was entitled to a reasonable time to make those inquiries. In the meantime it was his duty to keep the plaintiff in his custody, and the plaintiff could not complain of that detention, because his being in custody under such circumstances was the result of his own conduct. If the sheriff had kept the plaintiff in custody for a longer time than was reasonable to enable him to make those inquiries, the detention would have become unlawful, and the plaintiff would have become entitled to damages, but no such case was made at the trial. The case made at the trial was, first, that the arrest was

unlawful, but the jury on that point disbelieved the plaintiff; and, second, that the detention was unlawful. The argument on that was that the sheriff was bound to discharge the plaintiff as soon as the plaintiff told him he was not the man mentioned in the warrant. But, for the reasons which I have stated, the sheriff was first bound to inquire whether the plaintiff was the man wanted, and until a reasonable time for inquiries had elapsed the detention was lawful. It has not been found that an unreasonable time elapsed before the plaintiff was discharged. It may be that the plaintiff might have established that the detention was unreasonably long, but no such case was set up at the trial. Under these circumstances, I do not think that a new trial ought to be granted for the purpose of raising the question. I think, therefore, that the judgment is right, and the appeal should be dismissed with costs.

Solicitors for plaintiff: *H. B. Lilley and Cowlishaw.*

Solicitor for defendant: *J. Howard Gill*, Crown Solicitor.

Re BROOMFIELD.

Insolvency—Wife's separate property in possession of husband—Marriage settlement made in England—The Married Women's Property Act, 1890 (54 Vic., No. 9), s. 5.

A wife, who lent her husband separate property before the passing of *The Married Women's Property Act, 1890*, is not to be postponed in the proof of her debt in the estate of her husband, who has become insolvent since that Act, until the other creditors are satisfied. Sec. 5 of 54 Vic., No. 9, is not retrospective. It applies in a case of liquidation by arrangement as well as in insolvency.

APPEAL from an order of Harding, J., affirming a decision of the trustee in the estate of A. G. Broomfield, in liquidation, postponing the claim of the appellant to a dividend until the other creditors were satisfied.

The appellant was married to Alfred George Broomfield, in England, on April 12, 1875. Prior to her marriage she was possessed of certain leasehold property, and by an agreement made two

days before their marriage it was agreed that this property should be her separate property after marriage. After the marriage the property was sold, and the wife kept the money for her own separate use. In 1897 she and her husband came to Queensland, and in that year the husband, proposing to enter into business with his brother at Killarney, borrowed from her, on October 22, £1,071 in cash. Broomfield entered into partnership with his brother, and in January, 1891, his wife advanced him another £50. The appellant, however, abandoned her claim in respect to that sum. On November 30, 1891, the husband repaid £30 of the money he had borrowed from his wife, and on September 28, 1893, he repaid a further sum of £15, thus leaving a balance of £1,026, for which she claimed to prove. On October 3, 1894, Broomfield filed a petition for the liquidation of his affairs by arrangement, and on February 3 of the same year resolutions were passed liquidating the estate by arrangement. The appellant furnished the trustee with a proof of the whole amount of money lent by her to her husband, but the trustee stated that, under sec. 5 of *The Married Women's Property Act, 1890*, he would have to postpone her claim to a dividend until the other creditors were satisfied. Harding, J., upheld the decision on the ground that the appellant, being at the time she left England entitled there to the proceeds as her separate estate, with power, under sec. 11 of the English Act, to maintain an action in her own name for its recovery when she arrived here, as there was a marriage contract, the terms of that contract determined her rights with respect of the property here. Therefore, when she came here her rights were similar to those of any other married woman in Queensland having separate property. She therefore held it subject to the laws of the colony then existing and thereafter to be passed; that, consequently, her case was within sec. 5 of *The Married Women's Property Act, 1890*.

Rutledge, for the appellant, cited *Re Sibeth*, 14 Q.B.D., 417; *Macqueen's Husband and Wife*, 411; *Re Melbourne*, L.R., 6 Ch., 64; *Woodward v.*

Woodward, 3 De. G., J. & S., 672; and *Turnbull v. Forman*, 15 Q.B.D., 234; and submitted sec. 5 did not apply to liquidation by arrangement.

Lilley, for the respondent, contended that 54 Vic., No. 9, made no alteration in the law as regards the wife participating in dividends. She could not compete with other creditors. Her right did not vest until after the Act came into force. There is no difference between insolvency and liquidation. *Re Sparks*, 4 Q.L.J., 59.

GRIFFITH, C.J.: The appellant in this case married the liquidating debtor in England in 1875. Before the marriage an antenuptial agreement or settlement was made, under which she was to hold certain property as her separate estate. She afterwards sold that property and came with her husband to Queensland in 1887. In that year her husband went into business in partnership with his brother, and the appellant lent him £1,071, part of the separate estate in her hands. We must first consider what her rights were at that time. *The Married Women's Property Act* had not been passed, but the money was her separate estate, and under the law in Queensland at that time she was entitled to lend the money to her husband. Upon lending the money to him she became his creditor for that amount, and was entitled to bring an action against him to recover it, suing by a next friend, or without one, according to the practice of the Court, and in the event of his becoming insolvent she was entitled to prove in his estate just as any other creditor. That, I think, is sufficiently decided to be the law by the case of *Ex parte Melbourne* (L.R., 6 Ch., 64). In that case a wife was a creditor of her husband. He became bankrupt, and she sought to prove against his estate. A question arose whether the contract between her and her husband was valid under the law of Batavia, where they had been residing when the contract was made. It was held that that law did not affect her right to prove, and that law being out of the way, Lord Justice Mellish said: "I am of opinion that it is simply a question of priority of creditors *inter se*, and does not prevent the wife proving as creditor of her

husband in respect of this sum, which is in effect settled to her separate use; and that, as by the law of this country all creditors who have a right to prove are entitled to prove *pari passu* with the other creditors, she is in the same position, and is entitled to prove in the same manner." And, according to *Robson's Bankruptcy*, that appears to have been the practice. There is also a case of *Ex parte Wells* (2 Mont., D. & D., 504), which was a case in which a married woman proved, and trustees were appointed to receive the dividends. No doubt was suggested as to her right to prove. A case was, however, referred to by Mr. Lilley (*Re Beale*, 4 Ch.D., 246) which, he suggested, threw doubt on a married woman's right to prove in respect of her separate estate against her husband's estate in bankruptcy. That case, which was decided by Vice-Chancellor Bacon, seems entirely a decision on questions of fact. The Vice-Chancellor came to the conclusion that the woman had not really constituted herself a creditor of the debtor, and that the relationship of debtor and creditor did not exist between them. The cases referred to by him in support of his judgment were all cases in which that relationship did not exist, and the view of the facts on which he based his judgment showed that he thought it did not exist in that case. No cases have been brought before us which in my opinion in any way weaken the authority of *Ex parte Melbourne*. I therefore think that before *The Married Women's Property Act of 1890* was passed the present appellant was in the position of being a creditor of her husband, and if he had become insolvent, then she would have been entitled to prove in his estate in the same way as any other creditor. If that is so, the only question is, does *The Married Women's Property Act* make any difference? Sec. 5 provides that "any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him or otherwise shall be treated as assets of her husband's estate, in case of his insolvency, under reservation of the wife's claim to a dividend as a creditor for the amount

or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied." By that section she is to be on the same footing as what is sometimes called a voluntary creditor, a creditor without valuable consideration. If that section is applicable to the present case, as has been decided by the order now under appeal, she was not entitled to come into competition with the other creditors. That was what the trustee decided. The trustee allowed her claim, but intimated that he would postpone it until the other creditors had been paid in full. Now, the general rule in the interpretation of statutes is that if possible a new law is to be considered as applying to the future and not to the past. I do not know that that has ever been more forcibly stated than in the words of Lord Justice Bowen in *The London and North-Western Railway Company v. Evans* (1893, 1 Ch., 27): "When we pass from private grants between individuals to titles and rights created by an Act of Parliament, the exact subject matter is altered, but similar rules of good sense and law obtain when we have to interpret sections which do not expressly decide the matter. These canons do not override the language of a statute where the language is clear; they are only guides to enable us to understand what is inferential. In each case the Act of Parliament is all powerful, and, when its meaning is unequivocally expressed, the necessity for rules of construction disappears and reaches its vanishing point. Where the intention of the Legislature has been left to be collected from principles of reason, there are one or two obvious principles which have to be borne in mind. One such maxim, similar to that which has been alluded to as governing the case of private grants, seems obvious also with regard to Acts of Parliament. Where an express statutory right is given to make and maintain a thing necessarily requiring support, the statute, in the absence of a contract implying the contrary, must be taken to mean that the right to necessary support of the thing constructed shall accompany the right to

make and maintain it. More especially would this seem reasonable, when the thing to be constructed is one of public advantage and utility, in which the public are to have rights. The maxim of good sense and law so stated becomes applicable with more or less stringency according to the scope of the Act of Parliament. On the other hand, the Legislature cannot fairly be supposed to intend, in the absence of clear words showing such intention, that one man's property shall be confiscated for the benefit of others, or of the public, without any compensation being provided for him in respect of what is taken compulsorily from him. Parliament in its omnipotence can, of course, override or disregard this ordinary principle as it can override the former, if it sees fit to do so, but it is not likely that it will be found disregarding it without plain expressions of such a purpose. Those two maxims or principles appear to bear on the construction of statutes like the present, and may be called canons of construction, not because they are inflexible doctrines, but because they are doctrines of sound sense and obvious justice, to be borne in mind in dealing with legislation that cannot be supposed, unless it so explicitly states, to neglect what is reasonable and business-like on the one hand, or what is natural justice upon the other." Now, applying that principle to the present case, if the effect of *The Married Women's Property Act* is to postpone the wife's claim to a share of the proceeds of her husband's estate with the other creditors, in the words of Lord Justice Bowen, her property would be confiscated for the benefit of the other creditors. That is a thing which the Legislature could not be fairly supposed to have intended, in the absence of clear words showing such an intention. There is no doubt of her right before the passing of the Act to maintain an action against her husband, or in the event of his insolvency to prove and receive in the distribution of the estate an equal share with the other creditors. That was a vested right. If the Act operated retrospectively it would have the effect of taking from her that right without any compensation. With respect to loans made

after the passing of the Act, there could be no injustice, because the wife lending money then would know that she did so with those consequences. That construction is supported by the decision on the section relating to contracts in the corresponding English Act, that the section only applies to contracts made after the passing of the Act. So I think that sec. 5 applies only to loans made after the passing of the Act. I think that the law applicable to this case is the law that existed when she lent the money in 1887, and that she is therefore entitled to prove in insolvency in the same manner with any other creditor. It was argued further that sec. 5 does not apply to cases of liquidation. If the section does not apply to the case, it is not necessary to consider that point. But I have no doubt that the word insolvency, as used in sec. 5, means the event of a man becoming subject to the laws of the colony relating to insolvent debtors; and even if it did not, the words of sec. 202 (7) of *The Insolvency Act* would be sufficient to make it apply to cases of liquidation. I think the appellant was entitled to prove *pari passu* with the other creditors, and that the appeal should therefore be allowed, with the costs out of the estate.

COOPER, J.: I am of the same opinion for the same reasons. It appears to me that the point on which the case turned was not definitely brought before the notice of the learned judge who tried the case. That has been admitted at the bar, and I feel that had His Honour had the advantage of having it argued as it has been before the Court he would have come to the same conclusion.

REAL, J.: I am of the same opinion.

Appeal allowed.

Solicitors for appellant: *Foxton & Cardew*.

Solicitors for respondent: *Chambers, Bruce, & McNab*.

In re HALL, LIQUIDATING DEBTOR.

Insolvency Act of 1874 (38 Vic., No. 5), ss. 193-195—Liquidation—Release of trustee—Accounts—57 Vic., No. 15, ss. 6, 7.

Since the passing of 57 Vic., No. 15, a trustee of a liquidating debtor cannot obtain his release until the accounts have been audited, and the report of the accountant in insolvency has been filed, and produced before the Registrar.

APPEAL from the Registrar refusing to register special resolutions closing the liquidation proceedings in the estate of W. Hall, and granting the trustee his release. The report of the accountant in insolvency had not been produced, and no evidence was given that the trustee's accounts had been audited as required by ss. 6 and 7 of *The Insolvency, Intestacy and Insanity Administration Act of 1893* (57 Vic., No. 15).

GRIFFITH, C.J., referred the matter to the Full Court.

MacDonnell for the trustee.

GRIFFITH, C.J.: Before the Act of 1893 there was no provision requiring the accounts of a trustee in a liquidation estate to be audited by any officer of the Government or of the court. The discharge of the debtor and the release of the trustee might be granted by special resolutions carried at a general meeting of creditors; the accounts might be audited in pursuance of such resolutions at such times and on such conditions as the creditors might think fit—sec. 202 (9). Then in 1893 the Legislature interposed and said that, notwithstanding the provisions which I have just read, the provisions in insolvency relating to the auditing of the trustees' accounts shall apply to the accounts of trustees in liquidation, and that the provisions of secs. 193-195, which require the trustee to submit his accounts for audit to the accountant in insolvency, shall apply to liquidation proceedings. Sec. 6 of the Act of 1893, providing for the auditing of trustees' accounts and the transmission of statements to the registrar, is imperative. The Legislature intended that in all cases in which persons are in insolvent circumstances, the accounts of the trustee on the winding up of the estate shall be audited by the accountant in insolvency. In the present case resolutions were passed by the creditors releasing the trustee, and closing the liquidation. The release of a trustee in insolvency has, I think, the

same effect as the release of a trustee in an administration action. If his accounts are taken in court, and the court discharges him, then he is entirely free from anybody afterwards claiming to inquire into his administration of the estate. The release granted by the creditors in liquidation proceedings, although granted by their resolution, has to be attested by a certificate of an officer of the court. Liquidation proceedings are proceedings in court, and the release is a release granted by the court. If, therefore, a release was granted without the imperative provisions of the Act of 1893 having been complied with, any irregularities or defaults could no longer be inquired into. The necessary inference is that the release ought not to be granted until the court or an officer of the court has been satisfied that the provisions of the law have been complied with. The Registrar, on the resolutions for the release of the trustee being presented to him, asked for evidence that the accounts had been audited. The trustee did not produce any such evidence, and on appeal to me it was argued, as it has been before the court, that the trustee was not bound to give evidence, the release being entirely in the hands of the creditors. I thought the matter was of such importance to trustees in liquidation proceedings and creditors that I referred it to the Full Court. I am of opinion that the provisions of *The Insolvency, Intestacy, and Insanity Administration Act* are imperative, and that a trustee is not entitled to release until he has complied with them. The Registrar was, therefore, justified in inquiring whether the provisions of the Act had been complied with before granting the certificate giving the trustee his release.

HARDING and REAL, JJ., concurred.

Solicitors: *Chambers, Bruce & McNab.*

IN CHAMBERS.

GRIFFITH, C.J.

16th August, 1894.

QUEENSLAND INVESTMENT AND LAND MORTGAGE COMPANY v. HART AND OTHERS.

Order XXXV, rr. 3 and 28—Mode of trial—When jury necessary.

An order cannot be made under O. XXXV, r. 28, directing a trial without a jury if the case is one in which a conflict of testimony is likely to arise.

This was an action brought by the plaintiffs as mortgagees in possession against the defendants as executors of the will of E. White, on covenants contained in a mortgage given by White and one Robinson.

In defence it was alleged that White was surety only for Robinson, and that plaintiffs, after White's death, gave time to Robinson; and also that plaintiffs had, after White's death, elected to look to Robinson alone. The plaintiffs set the action down for trial under Order XXXV, r. 3, before a judge without a jury, and the defendants within the prescribed four days demanded a jury.

A SUMMONS was taken out by the plaintiffs under O. XXXV, r. 28, for an order to have the action tried before a judge without a jury.

Lilley, for the plaintiffs, referred to *Baring v. N.W. of Uruguay Co.* (1893), 2 Q.B., 406, and *Rouse v. Bradford Banking Co.* (1894) 2 Ch. 32, and submitted that under the circumstances a jury was not necessary, and that the case should be tried before a judge alone.

Shand, for the defendants, pointed out that under O. XXXV, r. 28, the judge's power to make an order for the trial of issues before a judge without a jury, was limited to causes or matters which previous to the passing of the *Judicature Act* could, without any consent of parties, have been tried without a jury.

GRIFFITH, C.J.: Before the *Judicature Act*, this case would have been brought on the Equity side of the Court. The issues of fact are such as to render it likely that a conflict of testimony will arise upon them, and therefore under section 75 of the *Equity Procedure Act*, evidence upon them

would, before the passing of the *Judicature Act*, have been ordered to be taken orally. By section 76 of that *Act*, where issues were to be tried by oral evidence, any party might have required them to be tried by a jury. The plaintiffs' summons must therefore be dismissed with costs, which will be taxed with the costs of the action.

Solicitors for plaintiffs: *Chambers, Bruce & McNab*.

Solicitors for defendants: *Rüthning & Jensen*.

CHUBB, J.

31st August, 1894.

NORTH QUEENSLAND MORTGAGE AND INVESTMENT
COMPANY v. M'DONALD.

*Practice—Final judgment—O. III, r. 6 : O. XIV,
r. 1a—Specially indorsed writ—Interest.*

A writ was indorsed for £358 5s. 9d. for principal and interest due under a covenant. The particulars (with dates) were: Principal sum, £300; interest under covenant at 9 p.c. to date of writ, £58 5s. 9d.; total, £358 5s. 9d. The plaintiff also claimed interest on £300 of the above sum from the date of writ to judgment.

Held, that the claim for interest on £300 of the above sum was not a special indorsement under O. III, r. 6, and a summons for final judgment was dismissed.

SUMMONS for final judgment.

Leu for plaintiff.

Beaumont, for the defendant, raised a preliminary objection.

CHUBB, J.: The plaintiff applied for liberty to sign judgment in this action under O. XIV on a writ indorsed as follows:—The plaintiff's claim is for £358 5s. 9d. for principal and interest due under a covenant. The particulars are (giving dates): Principal sum, £300; interest under covenant at 9 per cent. to date of writ, £58 5s. 9d.; total, £358 5s. 9d. The plaintiff also claims interest on £300 of the above sum from the date of the writ until judgment. It was objected for the defendant that this was not a good indorsement, because (1) the interest claimed upon "£300 of the above sum" is not shown to be payable under the covenant or by agreement, and *prima facie* is only recoverable as damages at the discretion of a jury at the trial; (2) the rate of interest

is not specified—the defendant cannot, therefore, calculate the amount if she wishes to pay; (3) it is left indefinite whether the words "£300 of the above sum" are limited to the principal sum or include both principal and interest. The objections are, of course, extremely technical; but, if sound, I am bound by the authorities to give effect to them. As Lopes, J., in *Wilks v. Wood* (1892) 1 Q.B., at p. 687 says, "The plaintiff seeks to put in force a summary remedy, which is without doubt very valuable, but of which the application requires to be strictly watched. The procedure under Order XIV, r. 1, is founded on O. III, r. 6, and it is a condition precedent to its application that there should be a specially indorsed writ within the meaning of the latter rule." *Ryley v. Master*, and *Sheba Gold Mining Co. v. Trubshawe* (1892) 1 Q.B. 674, decided that a writ indorsed with a claim for interest which did not show that the interest was claimed by statute, or under any contract between the parties, was not specially indorsed so as to entitle the plaintiff to final judgment under the order. *Wilks v. Wood* before cited, and *Gold Ores Reduction Co. v. Parr* (1892) 2 Q.B. 14, are to the same effect. The indorsement here is perfectly good as to the £358 5s. 9d., but the claim for interest on "£300 of the above sum" contravenes the rule, and is clearly bad, upon the authority of the cases mentioned, as it does not show whether the interest is payable by agreement (that is under the covenant) or by statute, nor is the rate claimed specified, and the defendant, as stated by Lord Coleridge, C.J., in *Sheba Gold Mining Co. v. Trubshawe*, at p. 682, "should not be called upon to take the risks of calculation"; and further, it is not clear whether the plaintiff intends to claim interest upon the principal sum of £300 or upon £300, part of £358 5s. 9d., in which latter case he would be claiming interest upon interest. Upon these grounds, therefore, I must decide against the indorsement, and the summons must be dismissed with costs.

CHUBB, J.

5th September, 1894.

In re The Bills of Sale Act of 1891, and in re
DUNSTAN.

Bills of Sale Act of 1891 (55 Vic., No. 23), s.s. 3, 8, 9, 10, 17—Absolute deed of gift—Renewal of registration.

A husband executed a post nuptial deed of gift of chattels in favour of his wife, which was registered under s. 3 of 55 Vic., No. 23, but the registration was not renewed within twelve months. The gift was followed by delivery of possession.

Held, that registration was necessary, but that being an absolute assignment, and not a security for money, renewal was not required by *The Bills of Sale Act of 1891*.

APPLICATION for an extension of time to rectify an omission to renew the registration of an assignment, No. 37, Book 1, in the office of the Clerk of Petty Sessions at Charters Towers.

CHUBB, J.: This is an application made under the 17th section of *The Bills of Sale Act of 1891* for an order to rectify the omission to renew the registration of the instrument in question by extending the time for such renewal. The application is a simple one, but it raises an important question on the construction of the Statute, and that is whether instruments of this nature are within the scope and intention of the renewal sections of the Act. The particular instrument is a post-nuptial deed of gift of chattels from a husband to his wife, made in consideration of natural love and affection, and the nominal sum of ten shillings. It is not a marriage settlement, or within the exceptions mentioned in sec. 3. It was registered on 13th June, 1892, and the registration has not since been renewed. It is clear that a deed of gift is a bill of sale within the definition given by sec. 8. It was an absolute assignment of chattels—a common law assurance—and required to be registered. *Tuck v. Southern Counties Deposit Bank*, 42, Ch.D. 471. It was followed by delivery of possession. Must that registration be renewed? The 8th section of the Act enacts that the registration of “a bill of sale” (not every bill of sale—sec. 4) must be renewed once at least in every twelve months, otherwise it

becomes inoperative as to the chattels comprised in it. The 9th section says the renewal shall be effected by filing in the registry an affidavit made by the person or one of the persons entitled to the money secured by the bill of sale, or his agent, who is able to depose of his own knowledge as to the amount owing on the security thereof, and stating the amount estimated to be owing on the security of the bill of sale at the date of swearing the affidavit. Now, it is perfectly plain that the conditions contemplated by the section, while applicable to bills of sale which are mortgages, do not exist in the case of a deed of gift. There is no money secured by it, consequently there is no amount owing on the security thereof, and no person entitled to any money secured thereby, and, therefore, no person enabled to depose as to the amount owing on the security. The facts precedent to the making of the affidavit have and can have no existence. It is, therefore, impossible to comply with the letter, and, I think, the spirit, of the enactment and *lex non cogit ad impossibilia aut inutilia*. One of the many rules for construing a Statute is to ascertain its object. There can be no doubt what the object was in requiring renewal of the legislation; it was to prevent fraud by secret arrangements, and to enable any person interested in knowing the fact, by searching the register, to ascertain the existence or otherwise of the security, and the approximate amount due thereon; a most useful provision in the case of mortgages, but totally useless as regards deeds of gift or absolute assurances. These once registered, give all the information, *ab origine*—ten thousand renewals of the registration would give no more. The act of renewal as far as affording any information is useless and reasonless, and, therefore, *cessante ratione cessat ipsa lex*. Can it be said that the Legislature meant that every registered instrument coming within the definition of bill of sale should, no matter what its provisions or effect, be renewed every year? If so, every absolute bill of sale and every assurance of a like nature, whether accompanied by delivery of possession or not, must be annually renewed so long as the property remains in the grantee. It

was decided in *Leslie's* case, 5 Q.L.J., 17, that possession by the grantee was not equivalent to registration; but that was the case of a conditional unregistered bill of sale—a mortgage, in fact—made before the commencement of the Act, and not registered within the days of grace allowed by the Act. A bill of sale does not become exhausted so long as any money remains on the security, but it becomes *functum officio*—spent—as regards the chattels comprised in it when they have been sold under it (*Cookson v. Saire*, 9 Ap.Ca., 658). If, therefore, a deed of gift, or for the matter of that, every absolute assurance of chattels, is to be held as coming within the renewal provisions, renewal is, by sec. 8, imperative, whether the possession of the chattels is in the possession of the grantee or not; though how it is to be effected I am at a loss to conceive, seeing that the machinery provided for the purpose is deficient, the affidavit prescribed by the Statute being an impossibility in such cases. Apart from this difficulty, it appears to me an absurdity to require the grantee of a registered absolute assurance of chattels, followed by delivery of possession, to renew his title annually by registration. Such a course can serve no useful purpose. By sec. 10, if the chattels are left in possession of the grantor, the order and disposition clause of the *Insolvency Act* applies, unless the bill of sale “has been and continues to be duly registered,” which means, without doubt, due registration and renewal thereof. But what effect can be given to this section if the bill of sale happens to be an absolute one, or a deed of gift, and not a mortgage, which seems to be the only kind of bill of sale contemplated by sec. 9? It is to be observed that the affidavit prescribed is not merely incidental to the renewal, a means to the end, it is the end itself. “The renewal shall be effected by filing” the specific affidavit, so runs the section. The Legislature has, either intentionally or inadvertently, provided machinery only for renewing the registration of certain, not all, bills of sale, and I think I must hold that where it is impossible to comply with the specific directions of the section, the renewal of the registration is in such cases not

required or intended. By prescribing a mode of renewal which can only be made to apply to bills of sale which are securities for money, the Legislature has, whether it intended it or not, excepted all other bills of sale in respect of which the prescribed mode cannot be followed. Consequently, in my view, the renewal of registration of this deed of gift is not capable of being effected under, nor is it required by, the provisions of the Statute. But for this opinion I should have been willing to make the order applied for. There will, therefore, be no order.

GRIFFITH, C.J.

15th November, 1894.

Re FERRETT'S TRUSTS.

Will—Construction—Legal estate—Death of devisee in trust before testator—Appointment of new trustees—New trustee and beneficiary.

The will of a testator who died after June, 1878, began thus:—“I give my property as follows: After my debts are paid to my sister A. M.” He appointed two executors who pre-deceased him. By a codicil he gave to B. F. and her children E. and H. “notwithstanding the provisions of my will,” half his property remaining after all his just debts were paid, the other half to go as directed by the will, “the property to be disposed of for the joint benefit of all interested.”

Held, that the executors took the legal estate.

The Curator of Intestate Estates consenting, new trustees were appointed in his stead. One of the new trustees was a beneficiary. He was required to give an undertaking to apply in the event of his becoming sole trustee for the appointment of a co-trustee before acting on the trusts.

Re Allen (Seton 4th ed. 539) and *re Lightbody's Trusts* (52 L.T. 40) followed.

PETITION for the appointment of new trustees under the will and codicils of John Ferrett, deceased.

Macgregor appeared for the petitioner.

The argument and facts appear in the judgment.

GRIFFITH, C.J.: The testator by his will gave his property “as follows: After all my lawful debts are paid to my sister A.M.,” except a legacy to a person who predeceased him. He appointed two executors, one resident in Queensland and one in England. By a codicil he gave to his sister, B. F., and her two children, E. and H., “at my

decease, notwithstanding my will may direct to the contrary half my property remaining after all just debts," and the legacy, "are paid, the other half to go as my will directs to my sister, A. M., and her children, to be disposed of for the joint benefit of all interested, the property to be solely the children's at their mother's death." By another codicil he appointed an executor in place of one who was dead. The intention of a will is to be collected from all parts of it, and effect as far as possible must be given to all its provisions. I am disposed to think that under the original will, notwithstanding the reference to debts, the legal estate was vested in A. M. and her children (*Doe v. Hughes*, 6 Ex. 223, 20 L.J., Ex. 148). But the words in the codicil, "To be disposed of for the joint benefit of all interested," import, I think, a direction that the property was not to be taken in specie, but was to be disposed of and the proceeds divided amongst the beneficiaries, some of whom he knew to be living in England. A direction to beneficiaries to dispose of their own property would be nugatory. I think therefore that the plain intention is that the disposal of the property was to be effected by some one else. No one but the executors can be suggested as the persons to perform this duty, and as effect could not be given by them to this direction, unless they took the legal estate, I think it follows that the legal estate was given to them (*Ward v. Decon*, 11 Sim., 160; *Robinson v. Lowater*, 5 D.M. and G., 272; *Darics v. Jones*, 24 Ch.D., 190; *Brooke v. Brooke*, 1894, 1 Ch., 48). They both predeceased the testator, who died after June, 1878. The legal estate is therefore now vested in the Curator of Intestate Estates upon the trusts of the will. One of the beneficiaries asks for the appointment of new trustees. The curator, who has been served with the petition, consents to the appointment of new trustees in his room. Under these circumstances it is, I think, "expedient" within the meaning of sec. 13 of the *Trustees and Incapacitated Persons Act of 1867* to appoint new trustees. I doubt whether the court on this petition could remove the curator without his

consent (*re Hodson's Settlement*, 9 Hare, 118; *re Blanchard*, 3 D.F. and J., 131). But in 1854 Wood, V.C., made an order appointing new trustees under the Act with the consent of the heir-at-law (*re Allen*, Seton, 539), and I will follow that case. H. Ferrett, one of the proposed trustees, is a beneficiary; the other is a solicitor of the court. Two of the four living beneficiaries reside in England. I think, however, that on the authority of *Lightbody's Trusts* (52 L.T., 40) I am justified in appointing them, but Ferrett must before the order is drawn up file an undertaking, attested and verified, that in the event of his becoming sole trustee he will forthwith and before further acting in the trusts apply to the court for appointment of a co-trustee. The order will recite the curator's consent to retire from the trusts and this undertaking, and will be as follows: Appoint Harry Ferrett and Pollett Loftus Cardew as trustees of the will and codicils of John Ferrett, deceased, dated, &c., in substitution for the Curator of Intestate Estates, and let the lands now subject to the trusts of the will and codicils vest in the said Harry Ferrett and P. L. Cardew for the estate therein now vested in the said curator, such lands to be held by them the said Harry Ferrett and P. L. Cardew upon the trusts of the said will and codicils.

The costs of the petition and of this order will be paid out of the estate.

Solicitors for the petitioner: *Forston & Cardew*.

BUNDABERG CRIMINAL SITTINGS.

GRIFFITH, C.J.

5th October, 1894.

REGINA v. ROBINSON.

Prisoner committed for trial but unable to be brought to Circuit Town through illness—Form of Bench Warrant.

An information was presented against the accused for forgery and uttering. The accused did not appear, and the Crown Prosecutor, after reading an affidavit of the Government Medical Officer that the accused was in Brisbane Gaol and was

unable through illness to appear, applied for the issue of a Bench Warrant. The Chief Justice directed the application to stand over till the close of the Sittings, and on its renewal at that time a Bench Warrant was granted in the following form:—

Queensland.

IN THE CIRCUIT COURT AT BUNDABERG.

To all Police Officers within the Colony of Queensland, and to the Keeper of the Gaol at Bundaberg in the said Colony:

These are to require and in Her Majesty's name to charge and command you the said Police Officers upon sight hereof to bring before me at the Circuit Court now holden at Bundaberg in the said Colony Thomas Robinson against whom an information has been presented before me in the said Circuit Court for forgery and uttering a forgery if the Court be then and there sitting, and if not to convey the said Thomas Robinson to the Gaol at Bundaberg aforesaid and deliver him to the keeper thereof together with this Warrant. And These are further to command you the Keeper of the said Gaol to receive the said Thomas Robinson into your custody into the said Gaol and him there keep until the next Sittings of the said Circuit Court at Bundaberg aforesaid or until he shall thence be delivered by due course of law.

(Indorsement.)

I authorize that the within-named Thomas Robinson be bailed by recognizance himself in the sum of £80 and two sureties in the sum of £40 each.

CIVIL COURT.

HARDING, J.

18th October, 1894.

FRIEMUND v. SPANN.

Money repayable on demand—Condition precedent—O. XIX, r. 4a.

To a claim for money lent, repayable on demand, it was objected on demurrer that there was no allegation of demand in the statement of claim.

Held as there was a general averment of the performance of all conditions precedent, the demurrer must be overruled.

DEMURRER.

The statement of claim alleged that on or about 24th November, 1888, the plaintiff lent the defendant the sum of £250. The loan was to be repayable on demand, and was to bear interest at 5 per cent, payable so long as the principal remained unliquidated. On or about 16th February, 1891, the defendant paid £50 on account, and had paid the interest up to 24th February. The plaintiff now brought an action to recover £200, the balance due, and £5 interest. Against the plaintiff's statement of claim the defendant demurred, alleging that it was bad in law, inasmuch as it was not alleged that the repayment of the money had ever been demanded by the plaintiff.

Perske submitted that the demand was a condition precedent to the action, and must be alleged and proved in an action.

Gore-Jones, for defendant, submitted that if the demand was a condition precedent, it was met in this case by the general averment in the statement of claim that all times had elapsed, and all things happened necessary to entitle the plaintiff to be paid the balance of the loan with the balance of the interest due thereon, in accordance with Order XIX, r. 4a, of the *Judicature Act*.

HARDING, J.: The defendant demurs to the statement of claim, and says that it ought to have stated that before the action was brought the plaintiff had demanded the money. The question is a most technical one. No doubt half-a-century ago the demurrer would have been good, but since that time in England the *Common Law Procedure Acts* were passed, and enacted that a general averment of the performance of conditions precedent would be sufficient, and that if the defendant denied the performance of any particular condition he should take that one out and state that there was a condition of the contract to such and such an effect, and that the plaintiff had not performed the same. That was the law on the common law side of the court at home until the *Judicature Act* was passed. It was also the law out here. When the *Judicature Act* was passed at home other rules of pleading were enacted. It

was held out here shortly before a new rule (Order XIX, r. 4A) was made embodying the section of the *Common Law Procedure Act* that that rule would apply, but it was thought better, it being a decision of a single Judge, and not the decision of the Full Court, though all the Judges agreed with it, that it should be thrown into a rule of court and become the practice. So that under the *Judicature Act* we have the same rule in force here as to conditions precedent that had been in force since the colony started and in England since 1852. Now in this case the statement of claim in paragraph 3 contained conditions precedent or it did not. If a demand was necessary before action brought, it was a condition precedent. If it was not necessary before action brought, it was not a condition precedent. So that if on the construction of this paragraph it amounted in fact to this, that it was not a condition precedent, then Mr. Perske's demurrer failed because he alleged that it was. If it was a condition precedent the only authority at all that has been quoted to me bearing on the case, is a paragraph in *Leuke on Contracts*, p. 559. That, tracing it to its source, I find in *Birks v. Trippet* (1 Wms. Saund, p. 92). I have traced that out, and as far I can see from other parts of the book (1871 edition) and from *Smith's Leading Cases* and *Williams on Pleading*, none of them make the exception as contended for by Mr. Perske. The contract in the case was complete, but the right to sue might depend, taking the view taken by Mr. Perske, upon previous notice. As a question of pleading it is a pure simple question of condition precedent, and in my opinion the allegation under Order XIX, r. 4A, of the performance of all condition precedent is sufficient to cover it. I think the demurrer must be over-ruled.

Solicitor for plaintiff: *Watson*.

GRIFFITH, C.J.

29th October, 1894.

QUEENSLAND INVESTMENT AND LAND MORTGAGE

COMPANY, LIMITED, v. HART, ROBINSON, AND

BARKER (executors of E. White, deceased).

Principal and surety—Release of surety by giving time to principal debtor—Consideration for agree-

ment to give time—Consent of executors—Effect of subsequent promise or assent of executors—Collateral printed and written covenants differing in terms with respect to the same matter—Covenant to repay joint and several future debts—Liability of surety's estate for advances made to principal after his death.—Collateral, printed, and written contracts.

White and defendant Robinson, having been in partnership as sugar planters for a term of years, agreed before the expiration of the term that Robinson should take over the assets and discharge the liabilities of the firm and pay White £5,500 for his share, and that to enable him to make these payments, £7,000 should be borrowed on mortgage of the partnership property by both partners. White and Robinson accordingly obtained an advance of this sum from plaintiffs on the security of a bill of mortgage under the *Real Property Act*, and of a bill of sale, both of which were executed by both White and Robinson, and dated 21st June, 1880. The bill of mortgage, which was in print, contained a joint and several covenant to repay the advance of £7,000 on 7th June, 1885, with interest at 8 per cent., and also all further advances that might be made by plaintiffs to White and Robinson or either of them. The bill of sale, which referred to the bill of mortgage, was in writing. The covenant for repayment of further advances contained in it covered only advances made to the mortgagors jointly.

On the day following the execution of the securities White and Robinson executed a deed of dissolution of partnership containing covenants by Robinson to indemnify White against the £7,000 secured by the mortgages and the other partnership debts.

It did not appear that at the date of the securities plaintiffs were aware of the arrangement for dissolution, or that as between White and Robinson the former was intended to be a surety only. It was found as a fact that that relation existed at the date of the securities, and that plaintiffs became aware of it before any of the other transactions in question in the action.

White died in December, 1884, having appointed defendants his executors. They all proved the will. The defendant Hart was during all material times a local director of the plaintiff company.

In February, 1885, before the £7,000 fell due, Robinson applied in writing to plaintiffs for a renewal of the mortgage, describing it as "my mortgage falling due in June next," and asking that it might be renewed for three or five years "in my own name instead of White and Robinson." Plaintiffs replied that their board had sanctioned "the renewal applied for" for a term of three years. No fresh mortgage was executed, and no change was made in plaintiffs' books. Defendant Barker was not aware of this negotiation.

Held that these letters established a novation of contract by which plaintiffs accepted Robinson as their sole

debtor, and that Robinson was the agent of the executors for the purpose of entering into the contract.

Held further, that the letters constituted a binding agreement by plaintiffs to give further time to Robinson for payment of the debt, and that the liability of White's executors as sureties was thereby discharged, the extension of time not being made with their actual consent.

A promise to pay interest on a mortgage debt for a further period and not to exercise the right of redemption is a good consideration for a promise to extend the time for repayment.

The consent of Hart as one of plaintiffs' local directors and of Robinson as debtor *held* not to operate as an assent by White's executors to the extension so as to bind his estate; because (1) they did not intend in so consenting to act in the capacity of executors; and (2) consent of defendant Barker, the remaining executor, was not obtained.

In 1887 plaintiffs claimed the £7,000 from defendants as White's executors, and they wrote in reply a letter which in effect admitted their liability.

Held that executors cannot by a promise made without consideration revive a debt to which the testator's estate had been liable as surety, and which had been discharged by giving an extension of time under a binding agreement to the principal debtor. (*Mayhew v. Crickett*, 2 Sw., 185, and *Smith v. Winter*, 4 M. & W., 467, considered).

It appeared that when the letter was written defendants believed that White's estate was liable for the debt.

Held that the agreement or assent to be inferred from the letter having been given under a *bona fide* mistake of law would not in any event have been binding on them as executors.

After notice to plaintiffs of the dissolution of partnership between White and Robinson, and of the existence of the relationship of principal and surety between them, the plaintiffs advanced a sum of £1,500 to Robinson on the security of a lien on the crops on the estate comprised in the bill of mortgage. In the two following years (after White's death) fresh liens were given by Robinson to plaintiffs to secure the same sum.

Held: 1. That the advance, being made after notice of the dissolution and suretyship, was not an advance within the meaning of the contract between the parties as evidenced by the bill of mortgage and bill of sale read together:

2. That the advance having been in fact made by plaintiffs on Robinson's credit alone, was not within the terms of the covenant in the bill of mortgage:

3. That even if White was liable for the advance of £1500, that liability, being a liability of suretyship, was discharged by the renewal of the lien, which operated either by way of accord and satisfaction or as an agreement to give time to the principal debtor:

4. That the liability under the renewed liens given by Robinson after White's death was not within the covenant in the bill of mortgage.

Effect of collateral, printed, and written security considered.

FURTHER consideration of action tried before GRIFFITH, C.J., and a jury at Brisbane Civil Sittings.

Lilley and Woolcock for plaintiffs.

Byrnes, A.G., and *Shand* for defendants.

The facts and arguments appear fully in the judgment of the learned judge.

GRIFFITH, C.J.: The plaintiffs seek to recover from the defendants, as executors of the late Ernest White, two sums of £7,000 and £1,500, with interest, alleged to be payable under covenants contained in a bill of mortgage made on 21st June, 1880, by E. White and A. A. Robinson. The defendants with respect to the £7,000 say (1) that their liability was discharged by the plaintiffs accepting Robinson alone as their debtor; and (2) that as between himself and Robinson, White was a surety only, Robinson being the principal debtor, and that the plaintiffs, with the knowledge of this fact, entered into a binding agreement with the latter to give him extended time for payment without defendants' consent, so discharging the defendants.

With respect to the £1,500, the defendants dispute White's original liability, and say further that if it existed White was surety only, and that his liability was discharged by giving time to the principal debtor without their consent.

The action was tried before me with a jury at Brisbane. I left to the jury all the questions of fact that appeared to arise upon the evidence, it being agreed by the parties that as to any of such questions which might properly be for the court and not for the jury, the findings of the jury might be disregarded, and that as to any question with respect to which I ought to have directed a verdict the finding of the jury should be taken to be that which I ought to have directed, without regard to the actual finding, and that all necessary amendments should be taken to be made.

Upon the further consideration of the action many points of interest, and some of difficulty, were argued at length. Sitting as a court of first instance, and considering the magnitude of the amount at stake, and the probability that the case will go further, I think it proper to express my

opinion upon several of them.

For several years before June, 1880, White and Robinson had been carrying on the business of sugar planters in partnership at Helensvale Plantation. The term of the partnership having expired, it was agreed between them that Robinson should take over the partnership property and carry on the business, paying White £5,500 for his share. For the purpose of carrying out this agreement it was arranged that a sum of £7,000 should be borrowed on the security of the partnership property, and that White should join with Robinson in the mortgage to be given to secure the advance. The plaintiffs, whose business is to invest money on mortgage, agreed to make the desired advance of £7,000 to White and Robinson on the security of the partnership property, but it does not appear that the arrangement as to an immediate dissolution was then known to them. Accordingly, on 21st June, 1880, two instruments were executed by White and Robinson in favour of the plaintiffs, one a bill of mortgage containing the covenants sued on, and by which the land forming Helensvale Plantation was mortgaged to the plaintiffs, and the other a bill of sale comprising the machinery and chattel property upon the plantation. The bill of mortgage was on a printed form, with dates, names, and sums filled in in writing. The bill of sale was manuscript throughout. By the bill of mortgage the mortgagors jointly and severally covenanted to pay to the plaintiffs £7,000 on 7th June, 1885, with interest in the meantime at the rate of 10 per cent., reducible to 8 per cent. on punctual payment at the stipulated dates. They also covenanted to pay to the plaintiffs within 24 hours after demand in writing, "all such further and other sums of money which now are or which hereafter shall become due owing or payable by us or either of us to the mortgagees or shall be advanced or paid by the mortgagees to or for us or either of us." By the bill of sale, which recited the agreement by the plaintiffs to make the advance of £7,000 on the security of a bill of mortgage of the land (which was particularly described in the bill of

sale), and also a bill of sale over the machinery and chattel property on the plantation, the mortgagors covenanted to pay to the plaintiffs on 7th June, 1885, £7,000 with interest in the meantime at the rate of 10 per cent., reducible to 8 per cent. on punctual payment, and also on demand to pay to the plaintiffs "all and every such further sums or sum of money which now are or hereafter shall become due owing or payable by the mortgagors to the mortgagees or advanced or paid by the mortgagees to or for the mortgagors or on their account." The difference in the covenant as to further advances is material only as to the claim for £1,500, and I will further advert to it in dealing with that part of the plaintiffs' claim. So far as regards the £7,000, there is no doubt of White's original liability. The only question is whether that liability has been discharged or is still subsisting. On 22nd June, 1880, the day following the execution of the mortgages to the plaintiffs, a deed of dissolution of partnership was made between White and Robinson, by which the latter covenanted to pay the money secured by the plaintiffs' mortgages and all other the debts of the partnership, and to indemnify White against them. White's interest in the plantation property was shortly afterwards duly transferred to Robinson.

There can be no doubt that after the dissolution of partnership the relation of Robinson and White to one another with respect to the partnership debts was that of principal debtor and surety, although, as between themselves and the plaintiffs, each was a principal debtor as to the £7,000.

The jury found, in answer to a question left to them, that as between Robinson and White the relationship of principal debtor and surety existed at the time of the execution of the mortgages. This finding was impeached as being not warranted by the evidence. I am of opinion, however, that there was ample evidence to sustain it. Whether the real relationship between two joint contractors is or is not that of principal and surety is a question of fact, not depending in any way on the form of the joint contract, but on the actual nature of the arrangement between them. And I know

of no rule of law requiring it to be evidenced by writing. The fact, therefore, that the deed of dissolution is dated a day later than the date of the mortgages is in my opinion quite immaterial, the bargain between White and Robinson, in pursuance of which the former executed the bill of mortgage, having been made previously.

The jury also found that the plaintiffs became aware not later than August, 1880, of the dissolution of partnership, and of the fact that the relation of principal and surety existed between Robinson and White. It follows that the question so much discussed in *Rouse v. Bradford Banking Co.* (1894, 2 Ch., 92), and with the reasons for the ultimate decision of which by the House of Lords we have not yet been made acquainted, does not arise, for it is not disputed that where at the inception of a joint liability the relation of principal and surety exists as between the joint debtors, the creditor when he becomes aware of the fact is bound to have regard to the rights of the surety, and if he endangers them does so at his own peril. If the relationship of principal and surety between Robinson and White had not come into existence until the actual dissolution, *i.e.*, after the date of the mortgages, I should have thought it proper to wait for the reasons of the decision of the House of Lords in *Rouse v. Bradford Banking Co.* before giving judgment.

In June, 1884, Robinson, who was continuing to carry on the business of a sugar planter at Helensvale, applied to the plaintiffs for a loan of £1,500 on the security of that year's crop of sugar cane, which was granted. The jury found that this advance was made to him on his individual credit and not on the joint credit of White and Robinson.

In December, 1884, White died, and his will was shortly afterwards proved by the defendants as his executors. The defendant Hart was a local director of the plaintiffs and acted as such in the transaction of February, 1885, to which I will directly refer.

The defendant Robinson was White's former partner and joint covenantor with him in the

plaintiff's mortgages.

These mortgages fell due in June, 1885. Under the express covenant in the deed of dissolution, as well as under the agreement previously made with White in pursuance of which the latter had executed the mortgages, it was Robinson's duty to pay off the debt at that date. Acting apparently in view of this obligation, he wrote on 18th February, 1885, to the plaintiffs as follows:—

"Gentlemen, — My mortgage on Helensvale falling due in June next, I wish to make application to have it renewed for three or five years in my own name instead of White and Robinson." He added statements to show that the security had been largely increased in value since the original advance.

On the following day, Robinson's letter having been in the meantime considered by the plaintiffs' local board of directors, at which the defendant Hart was present, the plaintiffs' secretary replied to his letter as follows:—

"I beg to acknowledge the receipt of your letter of yesterday's date, applying for a renewal of your loan of £7,000 due 7th June next, and have now the pleasure of informing you that the Board of Directors has sanctioned the renewal applied for at 8 per cent. interest, the term to be three years."

These letters were acted on by the parties, who, however, appear to have rested content with the record of the transaction contained in them. No formal document was executed for the purpose of discharging the liability of White's estate. No fresh instrument of mortgage was executed, and the account in plaintiffs' ledger continued to be carried on under the heading of "White and Robinson."

The defendants rely on these two letters of 18th and 19th February as evidencing, either alone or with the surrounding circumstances, a novation of contract by which White's estate was discharged and Robinson was accepted by the plaintiffs as their sole debtor.

In the alternative they say that these letters constituted a binding contract by the plaintiffs with Robinson to give him an extended time for

payment of the debt, and that this extension having been given without their consent as executors, White's estate was consequently discharged. The plaintiffs on the other hand contend that the language of the letters does not import a promise to discharge White's estate, and that no such promise can be inferred from the surrounding circumstances taken in conjunction with them. They say further that whether such a promise can be inferred or not, and whether the letters constitute or not a promise to give Robinson an extension of time for payment, there was in either case no consideration for the promise, and that there was therefore no binding agreement that can afford a defence to this action.

The jury found as a fact that the plaintiffs at this time, *i.e.*, by the contract evidenced by these letters, agreed to accept Robinson alone as their debtor in respect of the mortgage debt of £7,000 in satisfaction of the joint liability of White's estate and Robinson. Apart from the letters of 18th and 19th February I do not think that there was sufficient evidence to support this finding. The burden of proof was on the defendants, and the rest of the evidence did not, I think, distinctly point to the existence of any such agreement. It was, in fact, only by judging the conduct of the parties by the light of the letters that such an inference could be drawn at all. Whether it could be properly drawn or not depends, therefore, upon the construction of the letters, which is, I think, under the circumstances, a matter of law for the court. The objection of want of consideration is, however, if valid, fatal to both defences founded on the letters, and I will deal with it first.

It was contended that although an agreement to accept the several liability of one or two or more joint debtors in satisfaction of the joint liability of all is not without consideration, inasmuch as the several liability is a different thing and attended by different legal incidents (*Lyth v. Ault*, 7 Ex. 669, 21 L.J., Ex. 217), yet this doctrine does not apply when, as in the present case, the creditor already has, by the terms of the original contract, the several liability of each

debtor as well as the joint liability of all. If, it was said, the agreement has the operation contended for, the plaintiffs merely gave up the several liability of White's estate and the joint liability of both, retaining the several liability of Robinson, which they had already. I am disposed to think that this contention is sound, and that a promise to relinquish a right cannot be supported by saying that the result of the relinquishment is that the promisor has something different from what he previously had, when the only difference is that part only instead of all of what he previously had remains to him. But it was answered for the defendants that the letters of the 18th and 19th February import a promise on the part of Robinson not to redeem the mortgage for a further period of three years from June, 1885, and to pay interest at 8 per cent. during that period, and that this promise is sufficient consideration to support the plaintiffs' promise, whether it was a promise to release White's estate or merely to extend the time for payment.

When the letters were written Robinson was bound to repay the loan of £7,000 on 7th June, 1885. On the other hand he was entitled to repay it on that day, but no sooner. A mortgagor is not entitled to redeem before the appointed day (*Brown v. Cole*, 14 Sim. 427, 14 L.J., Ch. 167). In the report of that case in the "Law Journal," Vice-Chancellor Shadwell is reported to have given as the reason for the decision that "if mortgagors were allowed to pay off the mortgage debt at any time after the execution of the mortgage it might be attended with extreme inconvenience to mortgagees, who generally advance their money as an investment." The right of a mortgagee to retain his investment has therefore a value recognised in a court of law. In the case of *Coudry v. Day* (1 Giff. 816; 29 L.J., Ch. 89), a stipulation in a mortgage that the property should not be redeemable for twenty years was held to be so burdensome a stipulation that the plaintiff was entitled, under the circumstances, to be relieved against it. A promise by a mortgagor that he will forbear to exercise an existing right of

redemption for a definite period, and will continue to pay interest for that period, imposes, in my opinion, a burden upon the promisor, and is therefore a sufficient consideration for a promise by the mortgagee.

I think that the letters of 18th and 19th February import a promise by Robinson that, in return for the advantage which he asked from the plaintiffs, he would forbear to exercise his right of redemption in June, 1885, would not exercise it for three years thereafter, and would in the meantime pay interest at 8 per cent. Even if the mortgage had been overdue, I think that the promise to pay interest for a definite period and not to redeem in the meantime, would be a good consideration for a promise to extend the period of redemption, whether the rate of interest was altered or not (*Lewis v. Lery*, 2 V.L.R., Eq. 110), although having regard to the case of *Ford v. Beech* (11 Q.B., 852) the effect of such a contract might be open to doubt. See also *Orme v. Galloray* (9 Ex. 544, 23 L.J., Ex. 118). I am therefore of opinion that the agreement constituted by the letters of 18th and 19th February was not invalid for want of consideration. The adequacy of that consideration is a matter for the parties and not for the court.

The next question is: What is the true construction of the plaintiffs' promise contained in that agreement? On this point I have had some difficulty. It is *prima facie* unlikely that the plaintiffs should have intended to give up their right of recourse to White's estate. Nor is there anything outside the letters themselves to indicate that their local directors applied their minds to that question. On the other hand the matter was evidently present to Robinson's mind, as is shown by his use of the words "in my own name instead of White and Robinson," and he says that after that time he always considered that White's estate had been discharged from liability for the £7,000. The plaintiffs must, however, be taken to have meant whatever is expressed by the language which they used, properly construed. The words of the plaintiffs' letter are, "the board has

sanctioned the renewal applied for." What was the renewal applied for? Plainly a renewal "in my own name instead of White and Robinson." On the whole, therefore, I am of opinion that the letter of 19th February must be construed as conveying the assent of the plaintiffs to a renewal or extension of the loan for three years in the name of Robinson instead of White and Robinson. Put in formal language, this is equivalent to an agreement by the plaintiffs that for the existing joint and several obligation of White and Robinson to repay the £7,000 in June, 1885, there should be substituted an obligation on the part of Robinson alone, to repay that sum; that the debt should remain secured on the same property (which was then Robinson's), but should not be payable until June, 1888, provided that interest was regularly paid in the meantime; and that on the other hand Robinson would not exercise his right of redemption in June, 1885, or before June, 1888, and would pay interest regularly at 8 per cent. (*Seaton v. Tregford*, L.R. 11 Eq., 591). I think that under the deed of dissolution, Robinson was the agent for White and for his executors for the purposes of entering into this agreement on their behalf (*Thompson v. Perceval*, 5 B. & Ad., 925).

Robinson's sole liability being thus substituted for the existing joint and several liability of White's estate and Robinson, it follows that the liability of White's estate no longer existed, but was discharged as soon as the new agreement took effect. I am disposed to think that it took effect immediately as an executed agreement, but even if it is to be considered as an executory agreement only, it certainly took effect when the first instalment of interest that fell due after June, 1885, was paid by Robinson. The defence of novation is therefore established.

Assuming, however, that I am wrong on this point, I proceed to consider the other defence, based on the same letters of 18th and 19th February, 1885. There can be no doubt that these letters import an agreement on the part of the plaintiffs to extend the time for repayment of the loan from June, 1885, to June, 1888, subject

to regular payment of interest in the meantime. And, for reasons already stated, I am of opinion that this agreement was a valid agreement, *i.e.*, an agreement for breach of which an action could be maintained. It is settled that an extension of time granted to a principal debtor does not discharge the surety unless the extension is granted by a "binding agreement." The exact meaning of that expression is perhaps open to question. It was said by Wood, V.C., in *Tucker v. Laing* (2 K. & J., 745) that "nothing short of the creditor's putting himself into such a position that he could not sue the principal debtor would be sufficient to discharge the surety from his obligation." It was contended for the plaintiffs that they had never put themselves in this position. In *Ford v. Beech* (11 Q.B., 852) it was held that an agreement, though for valuable consideration, to suspend the time for payment of a debt could not be pleaded as a defence to an action for the debt, the reason being that a cause of action once suspended is gone for ever, and that it could not have been the intention of the parties to produce such a result.

If that rule is applicable to the present case, the plaintiffs would, notwithstanding the agreement of February, 1885, have been in a position, on default being made in June, to sue Robinson, who would have no defence to the action, although he might have been entitled to maintain an action against them for damages—of what amount I know not—for breach of the agreement to extend the time. It has been suggested that the rule in *Ford v. Beech* is not recognised in a court of equity, and that such an agreement would constitute a good equitable defence to an action brought before the expiration of the agreed time (Roscoe, N.P., 16th ed., p. 670). Other suggestions have been made with a view to avoid the consequences of the rule (see *Moss v. Hall*, 5 Ex., 46; *Newington v. Lery*, L.R. 5, C.P. 612, 6 Id. 191; *Slater v. Jones*, L.R. 8 Ex., 190). It may be, that such an agreement made after breach is not a defence to an action on the original debt, unless it amounts to a release or accord and satisfaction, in which case an action would lie on the express or implied

promise in the new agreement to pay the original debt at the expiration of the agreed time of extension. But in that view, as the original cause of action would be gone, the right of recourse to the surety would be gone also (*Commercial Bank of Tasmania v. Jones*, 1893, A.G. 313), and the question of discharge by extension of time would be immaterial. The distinction taken in *Moss v. Hall* by Parke, B., seems, *pace tanti viri*, unsatisfactory. The ground for holding the surety discharged is that he has been prejudiced by the extension of time, so that the fact that the creditor himself is prejudiced by having rendered himself liable to an action for damages does not seem relevant. The present case is, however, I think, distinguished from *Ford v. Beech* by the circumstance that the extension of time was granted before any breach of the covenant.

There is no doubt that an agreement may at any time before breach be varied by a subsequent agreement, and that the substituted agreement constituted by the original agreement as so varied may be pleaded in answer to an action for breach of the stipulations in the original agreement which were varied by the later agreement (*Goss v. Lord Nugent*, 5 B. & Ad., 58; *Taylor v. Hillary*, 1 C.M. & R., 741).

I think, therefore, that if after June, 1885, and before any subsequent default, the plaintiffs had sued Robinson on the covenant in the bill of mortgage, it would have been a good defence to say that by an agreement made in February, 1885, the time for repayment of the loan had been altered to June, 1888, subject to punctual payment of interest, and that no default had been made before action. The difference in the form of contract is of course immaterial in a court of equity. It follows that, in the words of Wood, V.C., "the plaintiffs had put themselves in such a position that they could not sue the principal debtor," and that no reservation of their rights against the surety having been made, the defendants as White's executors are discharged, unless the extension of time was granted with their assent, or unless by a subsequent effectual act they

have confirmed or revived the obligation.

Now there is no doubt that the extension was granted with the knowledge and consent of Robinson, who was one of the executors, and who asked for it; and with the knowledge and consent of Hart, another of the executors, who, as one of the plaintiffs' local directors concurred in granting it. But Barker, the third executor, did not know of the extension until long after. In February, 1885, the executors had not yet undertaken the actual administration of the trusts of White's will. The jury have found that the defendants did not collectively at any time before August, 1887, consent to the extension, and that none of them before that date consented to it in his capacity of executor. These findings are manifestly in accordance with the actual facts. It is clear that none of the defendants applied his mind to the question as affecting White's estate until August, 1887. I am of opinion that the assent of a surety which is to deprive him of the benefit of a discharge by reason of an extension of time granted to the principal debtor must operate either by way of contract or by way of estoppel. In either view I do not think that one or more of several executors can bind the others who do not themselves assent (*Turner v. Hardy*, 9 M. & W., 770; *Tulloch v. Dunn*, R. & M., 416). And even if they do assent, and, *a fortiori*, if any number of executors short of the whole number could bind the others, I think that it is essential that in assenting they should act and intend to act in the capacity of executors (*Scholey v. Walton*, 12 M. & W., 510; *Brown v. Gordon*, 16 Beav. 802).

It follows, in my opinion, that when the agreement of February, 1885, took effect, and at latest as soon as Robinson had paid the first instalment of interest that fell due after June, 1885, White's estate was completely discharged from the obligation to pay the £7,000.

In 1887, however, the sugar industry had become depressed, Robinson was in arrear with his interest, and a claim was made by the plaintiffs upon the defendants as White's executors. The plaintiffs appear to have honestly believed, and

probably were advised, that their claim was a valid one. The defendants took advice, and the advice which they received from their solicitors was adverse. Under these circumstances they wrote on the 30th August, 1887, the following letter to the plaintiffs' secretary:—

“With regard to Messrs. White and Robinson's mortgage for £7,000 to your company, I have to inform you that the trustees of the estate of the late Ernest White are prepared to pay up the arrears of interest due upon the said mortgage, and if your company are willing to accept 7 per cent. per annum interest the trustees would allow the existing mortgage to continue say for three years from 30th September next, subject to six months' notice.”

This letter was signed by the defendant Hart “for self and co-trustees,” and he had apparently the express authority of his co-executors to write it. It was therefore their collective act in their representative capacity. The defendant Barker says, and the jury found, that he did not know for some time after the date of this letter that the extension of time had been granted to Robinson in February, 1885. I am disposed to think, however, that upon the evidence his executors must be considered to have been his agents for the purpose of making all necessary inquiries as to the liability of White's estate, and that he must be taken to have at this date known all that they knew on the subject.

Nothing was done upon this letter, but it was relied upon by the plaintiffs as bringing the case within the rule laid down in *Mayhew v. Crickett* (2 Sw. 185), that a promise by a surety to pay a debt for which an extension of time has been granted to the principal debtor is binding, and cannot be objected to as being made without consideration. Lord Eldon put the case as analagous to that of a promise to pay a debt discharged by a certificate in bankruptcy, which under the law of that day was a valid promise, original debt being considered a sufficient consideration. The learned reporter, in a note at p. 192, has collected a number of cases in which this

principle had been applied, being cases of four classes: (1) Promises to pay a debt barred by the Statute of Limitations; (2) promises to pay a debt discharged by bankruptcy; (3) promises to pay a debt contracted during minority; and (4) promises by the indorser of a bill of exchange to pay the bill, notwithstanding failure to give notice of dishonour.

It is settled that in the case of debts barred by the Statute of Limitations a promise by executors to pay the debt binds the estate. But I am of opinion that this is only the case in which executors can at their caprice impose upon the estate an obligation from which the law has discharged it (*re Robinson*, 29 Ch.D., 858). In that case Cotton, L.J., said (p. 861): "The duty of the administratrix is undoubtedly to get in all the personal estate she can, and not to pay any claims made against the estate unless they are those which may properly be paid. If she pays unnecessarily she is guilty of a devastavit." And again (p. 862): "It is the duty of an executor or administrator not to pay claims he is not bound to pay, i.e., he is not unnecessarily to diminish the estate which comes to his hands by paying a claim to which he has a defence." He points out that the case of claims barred by the Statute of Limitations is an exception, but, in his opinion, the only exception to the rule. Bowen, L.J., said (p. 863): "It is clearly his (an executor's) duty not to waste an estate not his own which he is administering for the benefit of others, in satisfying demands that are equally untenable in law and in equity." If, therefore, the rule in *Mayhew v. Crickett* is based on the principle stated by Lord Eldon, I am of opinion that it has no application to the case of a promise by executors made without consideration to pay a debt to the burden of which the estate is not legally liable.

In *Smith v. Winter* (4 M. & W., 467), the facts were that after an extension of time had been granted by the creditors to the principal debtor, but before the day on which the debt for which the surety was liable was originally payable, the surety assented to the extension of time. Lord

Abinger, C.B., appears to have rested his judgment on the fact that that day had not arrived when the assent was given. Parke, B., quoted the language of Lord Eldon in *Mayhew v. Crickett*, and added, referring to the defendant's consent: "His liability as a surety was thereby revived." On more clearly examining the facts of the case, however, it appears that after the consent of the surety was given, the creditor did a further act, which was necessary to make the extension of time already promised effective. The assent of the surety communicated to the creditor before or at the time of granting an extension of time would operate, as I have already pointed out, either by way of contract, for which the promise to grant the extension to the principal debtor would be a sufficient consideration, or by way of estoppel *in pais*. But it is difficult to see how an assent given after that time could operate by way of estoppel, or at all, except by way of promise. And in the absence of any new consideration for the promise, I know of no principle, except that stated by Lord Eldon, which would support the promise. In the present case, the defendants' assent to the extension of time, if the letter of 30th August, 1887, amounts to such an assent, was given after the time originally appointed for the payment of the debt, and in that respect the case differs from *Smith v. Winter*. This distinction is, however, I think, too fine to rely on. In my opinion, an assent given *ex post facto* may be evidence of an original assent, or of a promise to pay notwithstanding the extension of time, but cannot otherwise operate to revive a liability that is already extinguished. In the present case, for the reasons already stated, I think that such a promise, if made, was beyond the authority of the defendants (as the plaintiffs must, I think, be taken to have known), and did not operate to revive the obligation. If the matter were *res integra* it might perhaps be open to argument that the discharge afforded to a surety by an extension of time to the principal debtor, is an optional discharge, governed by principles analagous to those which entitle a party to a contract procured by fraud to elect either to

avoid it or affirm it, and if *Mayhew v. Crickett* and *Smith v. Winter* had been based on this doctrine I should have felt more difficulty. None of the cases, however, relating to the discharge of a surety by extension of time afford any suggestion that this is the true principle governing them. And, having regard to the very serious consequences that would follow from holding that it is at the option of executors to determine whether a heavy burden shall be imposed on the trust estate or not, I think it is safer to apply the general principles of the law of contract, and to say that a liability not presently existing cannot be imposed except by an agreement for valuable consideration.

I am therefore of opinion that the letter of 30th August, 1887, whether it is construed as a promise to pay, or as an assent to the grant of extension of time to Robinson, had not the effect of reviving the obligation as against the estate.

The jury further found that this letter was written by the defendants in the belief that White's estate was legally liable for that debt, and that they had no intention of reviving a debt for which it was not legally liable. They found also that the plaintiffs, when they received the letter, were probably under the same belief as to the liability of White's estate.

If the effect of the letter of 30th August, 1887, unimpeached, would be to revive the liability of the estate, it would, I think, be a question of some difficulty whether the present case is one in which the maxim *Ignorantia juris haud excusat* applies. See *Cooper v. Phibbs* (L.R. 2 H.L., 170), and *Daniell v. Sinclair* (6 A.C., 187). In the strong view that I take of the effect of *re Robinson*, it is not necessary to discuss this point at length. I am of opinion, however, that an entire misapprehension on the part of executors of their legal rights with regard to a claim against the testator's estate partakes so much of the nature of a mistake of fact, that a court of equity will not enforce a promise founded on such a misapprehension and made without present consideration. For all these reasons I think that the plaintiffs' claim with respect to the £7,000 fails.

To the claim for £1,500 several answers are made, to which I will briefly advert. 1. It is denied that this sum was ever within the covenant in the bill of mortgage. In the case of *Glynn v. Margetson* (1898, A.C. 851), which was an action on a printed charter party, Lord Herschell, L.C., says: "It is well recognized that, in construing an instrument of this sort, in considering what is its main intent and object, and what the interpretation of words connected with that main intent and object ought to be, it is legitimate to bear in mind that a portion of the contract is on a printed form applicable to many voyages, and is not specially agreed upon in relation to this particular voyage" (p. 854); and again, "When general words are used in a printed form, which are obviously intended to apply so far as they are applicable to the circumstances of a particular contract, which particular contract is to be embodied in or introduced into the printed form, I think you are justified in looking at the main object and intent of the contract and in limiting the general words used, bearing in mind that object and intent" (Ib. p. 855). I think that these observations are applicable to the present case. The printed bill of mortgage is evidently a form applicable to many cases—namely, cases of loans to mortgagors carrying on business in partnership. It is therefore stipulated that the partners and the mortgaged property shall be liable for all sums advanced to either of the partners. The object is apparently to avoid questions, that might otherwise be raised, whether any particular advance received by one partner is one for which he had authority to bind the partnership. And I am disposed to think that, even standing alone, the covenant in the bill of mortgage as to further advances ought to be construed as referring only to such advances made to individual partners as are not known to the mortgagees to be made for other than partnership purposes. This as matter of construction. The same result would probably follow from applying the doctrines of the court relating to fraud. But in the present case the real contract between the parties is contained in

the two instruments of 21st June, one of which is in writing. The covenant in the written instrument relating to further advances does not contain the words covering advances to the mortgagors severally. I think, therefore, that the court ought—to use the words of Lord Herschell—to look at the main object and intent of the whole contract, and to limit the general words contained in the printed covenant, bearing in mind that object and intent. Applying this rule, can it be doubted that the object and intent of the contract, so far as it related to further advances, was to secure the repayment of sums paid to the mortgagors while associated together, and advanced for the apparent purposes of their joint business? I think, therefore, as a matter of construction, that the covenant on the part of White did not apply to advances made by the plaintiffs to Robinson after they knew that the partnership was dissolved and that the joint business was at an end, any more than Robinson's covenant would have applied to advances that might have been made by the plaintiffs to White, after the dissolution, for the purposes of an entirely different business. I do not think any rectification of the instrument is needed to raise this defence, but the leave to amend will cover such relief if necessary.

2. The jury have found that the advance was in fact made on the credit of Robinson alone, not on the credit of White and Robinson. This finding is not, and could not be, impeached. I know of no reason why a man who has a security for future advances may not agree that an advance shall not be charged on that security. Even, therefore, if the covenant in terms covered the advance, I think that its operation would be excluded by the election of the plaintiffs when they made the advance not to take advantage of it (*Harriss v. Farcett*, L.R. 8 Ch., 866).

8. If White was liable for the advance made in June, 1884, it was as a surety only. In 1885, Robinson gave a lien on that year's crop for the same amount. Either this second lien operated as an accord and satisfaction of the debt secured upon the previous year's crop, in which case that

debt is gone altogether, or the agreement for a renewal of the lien, which was made before the appointed day for payment, operated as a valid agreement to extend the time of payment. There is no suggestion that the defendants in their capacity of executors ever assented to the extension. In either view, therefore, the liability of White's estate was discharged.

4. The debts secured by the fresh liens given in 1885 and 1886, even if considered as fresh advances made, or debts freshly accruing due, after White's death, cannot, I think, be brought within White's covenant upon any construction of it (*Coulthart v. Cleminson*, 5 Q.B.D., 42). These answers appear to me to completely dispose of the claim for the £1,500.

Judgment must therefore be entered for the defendants on the whole case. The costs follow the event. The costs of the application to dismiss for want of prosecution will be costs in the action. The plaintiffs must pay the costs of the administration summons.

Solicitors for plaintiffs: *Chambers, Bruce & McNab*.

Solicitors for defendants: *Rüthning & Jensen*.

DECEMBER SITTINGS OF THE FULL COURT.

M'MAHON v. PERRY.

Justices Act of 1886 (50 Vic., No. 17), ss. 226, 229
—*Special case—Time for appeal.*

The proviso to s. 229 of *The Justices Act* does not extend the time within which an application must be made under s. 226 for a special case. The only effect of that proviso is that justices are not to treat an application by the Attorney-General for a special case as frivolous.

SPECIAL CASE.

THE respondent, Elizabeth Jane Perry, was charged with a breach of s. 18 of *The Liquor Act of 1886*, but the magistrates at South Brisbane dismissed the complaint. The Attorney-General applied for a special case, setting out the reasons for their decision.

Feez and *McMahon*, for the respondent, objected that the appeal was out of time, as the application for the special case had not been made within seven days after the decision had been pronounced as required by s. 226 of *The Justices Act*.

Byrnes, A.G., and *Garrick*, for the appellant, referred to s. 229 of *The Justices Act*, and submitted that the Attorney-General could apply at any time.

GRIFFITH, C.J.: I think the first preliminary objection is fatal. S. 226 of *The Justices Act* authorises any party to a proceeding before justices to apply, within seven days after the decision is pronounced, to the justices to state and sign a special case, setting forth the facts and the grounds of the decision. It has been held that that is an imperative condition. Unless the application is made within seven days, the Court of Appeal has no jurisdiction to entertain the appeal. This case has been stated by the Attorney-General, and it is contended that the limit of time does not apply, because s. 229 provides that "the justices shall not refuse to state a case when application is made to them by or under the direction of the Attorney-General or Solicitor-General." Those words are a proviso to a section providing that justices may refuse to state a case if they think the application is frivolous. The effect of this proviso is that they may refuse to deal with a frivolous application, but shall not treat an application by or under the direction of the Attorney-General as frivolous. That is the only effect of the proviso. It does not extend the time. For that reason we cannot hear the case, and the appeal must be dismissed with costs.

HARDING, CHUBB, and REAL, JJ., concurred.

Solicitor for appellant: *J. Howard Gill*, Crown Solicitor.

Solicitor for respondent: *H. E. Smith*.

M'MAHON v. PATERSON.

*Licensing Act of 1885 (49 Vic., No. 18), s. 111—
Illegal sale—Forfeiture—Liquor Act of 1886
(50 Vic., No. 30), s. 7.*

Before an order is made for the forfeiture of liquor under s. 111 of the *Licensing Act*, justices ought to be satisfied that it was kept for the purpose of being illegally sold.

It is not unlawful for an unlicensed person to sell Queensland made beer in quantities of two gallons and upwards.

SPECIAL case stated by T. Mowbray, P.M., and A. G. Hamilton, J.P., from which it appeared that at a court of petty sessions held at Bundaberg on October 31, a complaint was made by Mr. J. M'Mahon, inspector under the *Licensing Act*, against William Paterson, charging that liquor, to wit bottled porter, was kept for sale by the respondent, who was not licensed to sell the same, in a certain house situated in Bourbon Street, Bundaberg, and an order for the forfeiture of liquor found on the premises was refused. The evidence given at the hearing showed that the appellant searched the respondent's premises on October 24, and seized eight cases of porter, seven cases of ale, and four bottles of stout. The bottles bore Perkins & Co.'s label, and were found in the bulk store at the rear of the respondent's premises. The justices found as a fact that the liquor seized was kept by the respondent for the purpose of sale, and that he was not licensed to keep or sell the same. The grounds of the decision were that there was no evidence to show that the respondent kept the liquor for sale in any less quantity than two gallons; that there was no evidence to show that the liquor in question was liquor on which duty had been paid as defined by sections 6, 7, 12, and 13 of *The Liquor Act of 1886*; that the liquor which was seized was shown by the evidence to bear the label of Perkins & Co., who were brewers in Brisbane, and it appeared from all the circumstances to be liquor which had been brewed in Queensland; that there was no evidence to make it appear that the liquor seized was kept for the purpose of being illegally sold or disposed of in terms of section 111 of the *Licensing Act*; and that the onus of proving that the liquor in question was kept for sale in any less quantity than two imperial gallons at the same time, or that it was liquor upon which duty had been paid,

or that it was kept for the purpose of being illegally sold or disposed of, rested on the appellant. The questions of law arising on the case were as follow: (1) Whether the onus of making it appear to the justices that the liquor was kept for the purpose of being illegally sold or disposed of as provided by section 111 of *The Licensing Act of 1885* rested on the appellant, or on the contrary, whether the onus of proving that the liquor was not kept for the purpose of being illegally sold or disposed of rested on the respondent; (2) whether liquor (not being wine) upon which duty had not been paid, and which was kept for sale in any quantity not less than two gallons of one and the same description of liquor at one time by a person not licensed to keep or sell the same, was kept for illegal sale; (3) whether the said justices were right in deciding that there was evidence that the liquor in question was not duty paid, whereupon the opinion of the Supreme Court was asked upon the said questions of law, whether or not the said justices gave a correct decision as above stated; or, if not, what should be done, or ordered by the said court, on the said premises.

Byrnes, A.G., and Blair, for appellant.

Powers for respondent.

GRIFFITH, C.J.: The information in this case was laid under section 111 of the *Licensing Act*, which provides that upon an information being laid before a justice charging that liquor was being sold or kept for sale by some person not licensed to sell it or keep it for sale, a warrant may be granted to an inspector or a constable to seize the liquor. Then the matter is to be investigated by justices, and if it appears that the liquor was kept for the purpose of being illegally sold or disposed of, the justices may order it to be forfeited. It was contended for the appellant that the word "illegal" in the latter part of the section does not limit or qualify the meaning of the first part, and that the same goods that may be seized as falling within the words of the first part of the section may also be forfeited under the second part. There are, in some Acts, similar sections, of which that construction would perhaps be a reasonable

one, but before coming to that ~~conclusion~~ it is necessary to inquire whether it is unlawful in all cases for an unlicensed person to keep liquor for sale or to sell it. When that inquiry is made it appears that in 1885, when the Act was passed, it was lawful for a grower of wine, without holding a license, to keep his own wine for sale. He was a person within the first part of section 111. And if we inquire further we find that there was no law at that time prohibiting the sale of beer and porter in quantities of two gallons and upwards by any person, whether holding a license or not. I have a recollection of trying to find such a law, but unsuccessfully. I do not think that there is, then, any law prohibiting the sale of wine in quantities of more than two gallons. Probably there is no such law. So that the mere fact that wine was kept for sale or was sold by a person who held no license was not *prima facie* evidence that he had committed an offence against any law. The mere fact of selling liquor or keeping it for sale was therefore ambiguous, inasmuch as one man who has no license could lawfully keep some liquor for sale, but another could not do so. It seems to me to follow that the true meaning of section 111 is that when the justices come to inquire into the circumstances under which the liquor seized was sold or kept, they are to inquire whether it was sold or kept for the purposes of sale under circumstances which were lawful or under circumstances which were unlawful. In the latter case it is to be forfeited, and in the former it is to be given back to the owner. It was necessary in this case, therefore, to prove that the beer was kept for the purpose of being illegally sold. What law, then, is there now prohibiting the sale of Queensland-made beer in quantities of two gallons and upwards? When the Act of 1885 was passed there was no law prohibiting it. *The Liquor Act of 1886* prohibited the sale of two gallons and upwards of any liquor on which duty had been paid except by certain persons. At that time it happened that Queensland-made beer was an article on which duty had to be paid, so that it became unlawful to sell such beer, not because it

was Queensland-made beer, but because it was liquor on which duty had been paid. In 1888, however, the duty was taken off beer made in Queensland, and Queensland-made beer no longer remained a liquor on which duty had been paid, and the only prohibition against selling it in quantities of two gallons and upwards was gone. It is, therefore, no longer unlawful to sell Queensland-made beer in quantities of two gallons and upwards. That is the law at present as far as I know. It follows in this case that the justices were quite right in coming to the conclusion that selling Queensland-made beer in quantities of two gallons and upwards was not illegal, and that the liquor was not on the premises of the defendant for the purposes of being illegally sold or disposed of, and in my opinion the decision should be affirmed with costs.

HARDING and REAL, JJ., concurred.

Solicitor for appellant: *J. Howard Gill, Crown Solicitor.*

Solicitors for respondent: *J. N. Robinson & Co.*

M'MAHON v. DEUSNAP.

*Licensing Act of 1885 (49 Vic., No. 18), s. 112—
Sale and delivery of liquor—Burden of proof.*

Liquor had been sold by grocers to a customer and was being delivered to the customer in a cart driven by defendant, who was their servant. No evidence was given for the defendant.

The justices found as a fact that the liquor was being carried for the purpose of delivery and not for sale, and dismissed the complaint.

Held that they were right, and that they were not bound to find that the liquor was being carried for the purposes of sale if, in their opinion, the evidence pointed to a different conclusion.

SPECIAL case stated by way of appeal from a decision of magistrates at Bundaberg, dismissing a case against Deusnap for carrying about liquor for sale or delivery without a license.

The respondent was a carter for a wine and and spirit merchant at Bundaberg, and was on the way to Fairymead when he was stopped by Inspector M'Mahon. Twelve bottles of ale were found in the cart, and a book in the possession of

the carter showed that they had been sold. Proceedings were taken against the carter, and the summons was dismissed.

Byrnes, A.G., and St. Ledger for appellant.

Powers, for respondent, was not called upon.

GRIFFITH, C.J.: Section 112 of *The Licensing Act* provides for the seizure of liquor which is reasonably expected to be carried about for sale or delivery in contravention of the Act by any person not licensed to sell it. The section goes on to say that whenever any such liquors are carried from one place to another, the burden of proving that they were not so carried for sale or delivery shall rest on the person carrying them. It was not necessary, therefore, for the prosecution to prove more than that the liquor was found being carried from one place to another by a person not licensed to sell it. In the present case the defendant was charged with carrying liquor from one place to another for sale. From the evidence it appeared that the actual sellers of the liquor carried on the business of grocers, and had apparently sold them to a customer, and the defendant was driving their cart for the purpose of delivering them. The justices found as a fact that the goods were being carried for delivery and not for sale. As I understand the point raised against their decision, it is that the justices were bound to find that the goods were being carried about for sale; in other words, that no evidence being given by the defendant, they were bound to find the facts as alleged in the complaint. I think they could find the truth. They might, perhaps, have found on the evidence for the prosecution, none being given for the defendant, that the goods were being carried for the purpose of sale, but they were not bound to do so if the evidence pointed to a different conclusion. The Attorney-General contended that the delivery was part of the sale. I think that it was intended to make a distinction between sale and delivery. The point is extremely fine, and almost trivial. A conviction might have been obtained by an amendment of the complaint, but Mr. Powers said that the amendment was offered to the complainant and refused. I confess I cannot see why, unless

it was to raise a dry point of law, the importance of which does not occur to me at present. At any rate, the point failed, and the decision should be affirmed, with costs.

HARDING and REAL, JJ., concurred.

Solicitor for appellant: *J. Howard Gill, Crown Solicitor.*

Solicitors for respondent: *J. N. Robinson & Co.*

IRVING v. GAGLIARDI (*ex parte* GAGLIARDI).—NO. 2.

Customs Act 1873 (37 Vic., No. 1), s. 237—Costs—Position of Crown Solicitor—Solicitors Act of 1891 (55 Vic., No. 22), s. 3.

When costs are awarded to an officer of the Crown they are to be taxed in the ordinary way, notwithstanding that the officer appeared by the Crown Solicitor, who receives a fixed yearly salary.

Attorney General v. Shillibeer (4 Ex. 606) followed.

Decision of REAL, J., reversed.

APPEAL from a decision of REAL, J., directing a review of taxation of the bill of costs of the Crown Solicitor, who had acted for the respondent Irving upon a motion for a quashing order in respect of a conviction for a breach of *The Customs Act* (*ante* 155) on the ground that the Crown Solicitor was in receipt of a yearly salary.

Byrnes, A.G., and *Power* for the appellant.

Rutledge for the respondent.

GRIFFITH, C.J.: This is an appeal from a decision of his Honour Mr. Justice Real, referring back for review the bill of costs of the Crown Solicitor, acting as solicitor for Irving, who was the prosecutor in a proceeding in the Court of Petty Sessions at Brisbane for a penalty and forfeiture for breaches of the Customs Acts. The Court of Petty Sessions made an order imposing a penalty and forfeiture, from which the defendant appealed to the Full Court by motion for a quashing order. The appeal was dismissed with costs, which were ordered to be paid by the appellant, the defendant in the court below, to the prosecutor Irving. By the 237th section of the *Customs Act* it is provided that in all suits or proceedings at the suit of the Crown for the recovery of any duty or penalty, or for the enforcement of any forfeiture, the parties

shall be entitled to recover costs against each other in the same manner as if such suits or proceedings were conducted and had between subject and subject. I am of opinion that an appeal to this court, whether by way of motion for a quashing order or by special case, is part of the proceeding for the purpose of recovering penalties. I think, therefore, that section 237 applies to these costs. It was contended before the taxing master, and again before Mr. Justice Real, that as costs are given to the successful party by way of indemnity, the successful party ought not to be allowed to recover from the opposite party any greater sum than he himself is bound to pay to his own solicitor; and that if by an arrangement between himself and his solicitor he need not pay him any costs, then he cannot recover any costs from the other party. There is no doubt that, as a general rule, costs are given by way of indemnity. For instance, it has been held that if, by reason of the operation of some statutory prohibition, the successful party is not liable to pay his own solicitor any costs, he cannot recover any costs from the opposite party. Whether, if a solicitor agreed to do the work for nothing, or for half costs, his client could recover any costs from the other party, or more than half costs, is an open question, which has apparently never yet been decided. Mr. Justice Real was of opinion that the appellant's contention was sound, and that Irving ought not to recover from the unsuccessful party any more costs than the Crown were bound to pay the Crown Solicitor in respect of these proceedings, and that the amount must be ascertained in the best way practicable, by inquiry as to what was the total value of the work done by the Crown Solicitor for the Crown during the year or some longer period, and what was the total amount of all costs received by the Crown for the services of the Crown Solicitor and his clerks for that period; and that upon that basis an apportionment should be made showing how much of the total expenses of the Crown Solicitor's department or office should be apportioned to these particular proceedings. In answer to that argument three cases have been cited to the Court.

The earliest in point of time is *Attorney-General v. Shillibeer* (4 Ex. 606), which was a considered judgment of the Court of Exchequer pronounced in 1850. The question was as to the costs recoverable by the Crown in a revenue proceeding under a statute which provided that in such cases the Crown should recover "full costs." The Court held that the fact that the solicitor for the Board of Inland Revenue received a fixed yearly salary did not affect the question, and that the costs were to be taxed in the ordinary manner. Mr. Rutledge relied on the circumstance that the statute in that case gave "full costs." But the Court of Exchequer said that that expression only meant ordinary costs as between subjects, to be taxed on the usual scale. If that were the true interpretation, there was no difference between the statute in that case and the 237th section of the *Customs Act* which we have before us. That case is not distinguishable from the present upon the facts. If, therefore, that rule governs the Court, Irving was entitled to full costs, to be taxed in the ordinary way as between subject and subject. That case was not cited to Mr. Justice Real. The next case in point of time is *Raymond v. Lakeman* (34 Beav., p. 584) in which the question was whether a railway company which employed a solicitor at a fixed annual salary was entitled, as against an unsuccessful litigant, to recover full costs of suit, or whether the court was bound to take notice that he was paid by a salary, and direct an apportionment. Sir John Romilly, M.R., came to the same conclusion as that arrived at in the *Attorney-General v. Shillibeer* which, however, was apparently not cited to him. That case also was not cited to Mr. Justice Real. The third case is *Galloway v. Corporation of London* (L.R., 4 Equity, 90) in which Vice-Chancellor Wood, under precisely similar circumstances, came to the same conclusion as in the other two cases. It is singular that neither of those cases was cited to him. All these judges came independently to the same conclusion upon similar facts, and I think we are bound by their decisions, unless the law has been since altered in some particular which governs the present

case. I confess that I do not like the possibility of the Crown making a profit by recovering costs in litigation which may amount to more than would pay the expenses of the Crown Solicitor's Department, or so much of the expenses of that department as are attributable to litigation with unsuccessful parties; but I do not see how we can escape from the authority of those three cases, unless there is some subsequent law to the contrary. Mr. Justice Real thought that the reasons for the judgment in *Galloway's* case were no longer applicable. I doubt, however, whether after the lapse of so many years—nearly forty-five—since the first case was decided, we should be justified in inquiring into the soundness of the reasons—whether we ought not simply to follow the judgments. For my own part I think that these three authorities are binding upon us, and I am disposed to think that Mr. Justice Real would have come to the same conclusion if he had seen them. Then the question arises, Has the law been altered since those decisions? We have now a law passed in 1891, called the *Solicitors Act*. That is a transcript of an Act passed in England in 1870, the object of which was to get rid of one of the principal rules governing the relationship between solicitor and client, so as to allow the solicitor to make a bargain with his client that he should get more than the amount which would otherwise be allowed to him on taxation. That that was the object is pointed out in the case of *Jennings v. Johnston* (L.R., 8 C.P., p. 425). Without such an agreement in writing, made in accordance with the statute, and which is liable to be reviewed by the Court, a solicitor cannot escape the obligation of having his bill taxed. It is singular that although that Act has been in force in England for twenty-four years, no case has been cited to show that the authority of the three cases I have referred to has ever been impeached; nor is there anything in the text-books to show that the point has ever been raised. Since 1879 the Crown Solicitor in this colony has been an officer of the Government, appointed by the Governor-in-Council, and paid by salary voted annually by Parliament, and the prac-

tice has always been, when costs are awarded to the Crown, to tax them in the ordinary manner. In the face of the previous authorities, and the long course of practice, we have to say whether any change has been made by the *Solicitors Act of 1891*. It was contended by the Crown that that Act did not bind the Crown. I hardly think that that question need be considered. If the Crown makes an agreement in writing with a solicitor within the terms of that Act, I apprehend that the Crown would be bound by it. But in this case there is no agreement in writing. The Crown Solicitor receives a salary, but that covers only his personal services, and not the work of clerks, copyists, and other persons necessarily employed in transacting the business of his office. There is no agreement in writing, and the provisions of the Act deal only with cases in which there are agreements in writing. The case has therefore to be decided irrespective of that statute. We cannot escape from the authority of the cases. I think, therefore, that the costs in this case ought to be taxed on the ordinary principle as between subject and subject, without any regard to the fact that the Crown Solicitor receives an annual salary. The appeal will therefore be allowed, and the summons to review dismissed.

HARDING and CHUBB, JJ. concurred.

The *Attorney-General* did not ask for costs of the appeal.

Solicitor for appellant: *J. Howard Gill, Crown Solicitor*.

Solicitors for respondent: *Thynne & Macartney*.

VICTORIA INSURANCE CO. v. KING.

Insurance—Damages—Subrogation—Assignment of chose in action—Judicature Act (40 Vic., No. 6), s. 5, sub. 6.

The plaintiff company insured certain wool belonging to the Bank of Australasia from Townsville to London. The wool was damaged through punts, the property of the Government, negligently running into the lighter on which the wool was being carried. The company paid the bank, believing they were bound to do so, and

the bank assigned to the plaintiffs the cause and rights of action which it had against the Government in respect of the collision and damage to the wool.

Held, that the bank's right of action was a *chose in action* within the meaning of subsection 6 of s. 5, of *The Judicature Act*, and that the plaintiffs were entitled to sue in their own name.

Action against the defendant, appointed under *The Claims against the Government Act*, for damages caused by the negligence of the servants of the Crown in a marine collision at Townsville. The plaintiffs had insured certain wool belonging to the Bank of Australasia. The bank made a claim on the company, who paid it. It was doubtful whether the loss was within the risk insured against. The bank executed a deed of assignment, assigning to the plaintiffs all their rights of action against the Government in respect of the collision and damage to the wool. The company claimed to be subrogated to all the rights of the bank, and to be entitled to sue in their own name. COOPER, J., gave judgment for the plaintiffs, and the defendant appealed.

Lilley and Shand for the plaintiff.

Byrnes, A.G., and Mansfield for the defendant.

GRIFFITH, C. J.: The plaintiffs, the Victoria Insurance Company, put their claim in two ways. They insured certain bales of wool, the property of the Bank of Australasia, from Townsville to London. The risk was to begin from the loading on board the ship which was going to London. The policy also included risks by fire or flood from the sheep's back until waterborne at Townsville. After the wool was insured, some of it was destroyed in consequence of steamers belonging to the Government coming into collision with the lighter in which it was in transit to the ship. The Bank appear to have made a claim on the plaintiffs for the value of the injured wool, and the plaintiffs paid the claim, honestly believing that they were liable to do so. The first of the two alternative ways in which the plaintiffs put their claim is this:—Having been the insurers of the wool they say they are entitled to be subrogated to all the rights of the owners, amongst which they claim the right to bring an action against the

Government for the negligence of their servants leading to the injury to the property. They further say they are entitled to maintain that action in their own name. The words of the policy were that the risk was to begin from the loading of the goods on board ship. The wool when injured was not on board ship, but on the lighter, and according to the ordinary construction of the words the risk had not commenced. If, however, the words in the policy, "risk by fire and flood until waterborne at Townsville," mean, as is contended, until the wool was loaded on board the ship, still the loss was found by the jury to have been caused by collision, and not through fire or flood. Apparently, therefore, the bank could not have claimed upon the policy if the facts were as found by the jury. But whether the bank were or were not legally entitled to recover the insurance money from the plaintiffs, the plaintiffs paid it. And, assuming that they were bound to pay the insurance money, and consequently entitled to be subrogated to the rights of the Bank, they claim to be entitled to sue in their own name irrespective of any assignment of the cause of action. That they are not entitled to sue in their own name is, I think, conclusively established by the case of *Simpson v. Thomson* (8 App. Cases, p. 279), a case which turned upon the absolute obligation of an insurer seeking to enforce rights to which he was entitled by subrogation to sue in the name of the person insured. In that case there had been a collision; but the owner of the property insured was also the owner of the ship by which the injury had been done. It was held that as he could not sue himself, and as the action must be brought in his name, the insurers could not sue or assert any claim against him under the right of subrogation. On both these grounds, therefore, if the plaintiffs' case rests on the right of an insurer to bring an action in his own name, it fails. But some three years after the collision the plaintiffs took an assignment from the Bank of Australasia of their causes of action arising from the collision, and it is claimed by the plaintiffs that under subsection

6 of section 5 of *The Judicature Act* they are entitled as assignees of a "legal chose in action" to maintain the action in their own name. It becomes necessary, therefore, if the first basis of the plaintiffs' claim fails, to consider the construction of that section. The term "legal chose in action" used in the section is, I think, large enough to include all kinds of actions, including actions for damages, whether for personal injury, injury to property, or any other course. Yet it seems manifest that it was not intended by the Act to allow a claim for damages, say, for defamation or breach of promise of marriage, to be assigned to a stranger. I think that the true construction is this: The Judicature Act, as has been often said, is a procedure Act, and does not alter substantive rights or substantive law. It does not alter the law as to assignment of "choses in action" so far as regards the lawfulness of such an assignment, but it removes all formal difficulties which formerly stood in the way of the assignee, preventing him from asserting his substantive rights by action in his own name. An assignment of a "chose in action," which was formerly not obnoxious to any rule of public policy, but which was ineffectual or not completely effectual, by reason of the technical rule of court of common law which would not allow an assignee of a "chose in action" to sue in his own name, or by reason of the want of jurisdiction of the Court of Equity over the subject matter of the assignment, is now made completely effectual by the removal of all formal obstacles. But I do not think that an assignment which was before unlawful, as distinguished from being merely ineffectual or not completely effectual, is made lawful or effectual by the Act. In my opinion the rule of common law which forbade trafficking in lawsuits is not abrogated. It is true that exceptions have been engrafted upon that rule by the insolvency laws and the Companies Act. But these are necessary exceptions, having regard to the objects of those Acts. Apart from statutory exception, I think that the law as declared in the cases of *Prosser v. Edmunds* (1 Y. & C., 481),

Dickinson v. Burrell (L.R., 1 Eq.), 897, *Hill v. Boyle* (L.R., 4 Eq., 280), and many older cases, is still the law of the land. I think, therefore, that the test to be applied for determining the validity of an assignment of a "chose in action," which in form is in accordance with the provisions of section 5, subsection 6, of the Judicature Act, is whether the subject matter or the assignment and the circumstances under which it is made are such that before the Act a court of law or equity would have considered the assignment a lawful one, and would have given in respect of it such relief as, according to the practice of the court, was appropriate. For instance, in a Court of Equity the assignee, if he received the debt or damages, the subject of the assignment, might be declared a trustee of them for the assignee. Or the assignee might be compelled to allow the use of his name as plaintiff in an action, or might be controlled in the conduct of an action brought by himself, so as to avoid prejudice to the rights of the assignee. (See *Commercial Union Assurance Company v. Lister*, L.R. 9 Ch., 483). In a court of common law, conflicting claims to the debt or damages awarded might be determined (*Cohen v. Mitchell*, 25 Q., B.D., 262), or an action might be brought for breach of a covenant contained in the assignment. But, if neither court would have treated the assignment as a lawful agreement, I think that it still remains ineffectual, not because it is not in form an assignment of a "legal chose in action," but because it is an attempt to assign that which the law does not allow to be assigned. It is no doubt a weighty argument against this construction that no instance is to be found in the English reports of an attempt to assign a "chose in action" in respect of damages unless the case of *Cohen v. Mitchell*, where the point was not raised, is to be considered one. But on the whole I think the construction I have indicated must prevail. Applying this rule, what were the subject matter and the circumstances of the assignment in this case? The circumstances of the assignment were these: The plaintiffs had paid some £900 to the Bank of

Australasia, believing that they were bound to pay it, or at all events that they were justified in doing so. If they had been legally bound they would have been entitled to maintain an action in the name of the Bank of Australasia, but not in their own name, and the result of that action would have been that they would have recovered exactly what the Bank of Australasia would have been entitled to recover. The difficulty in their way would therefore have been merely formal. It is true that on the view I take of the construction of the policy they had not that right, but in order to determine the validity of the assignment the court must consider whether it was a case of mere trafficking in lawsuits, or a transaction which a court of law or equity would have considered free from anything "savouring," as it was said, "of champerty." I think, I say, that we ought to consider all the circumstances of the case. And, just as I have no doubt that an assignment of the cause of action to insurers who are entitled to be subrogated to the rights of the assured would be a perfectly valid assignment within the meaning of the section of the Judicature Act, so I think the same rule must be applied, when, though they are not strictly speaking entitled to be subrogated, both parties honestly believe that they are so entitled. I think that in such a case the objection on the score of public policy fails, and that this assignment was therefore one that could not be held unlawful either before or since the passing of the Judicature Act. With respect to the damages, it appears that two bases were submitted to the jury—one the agreed value of the goods according to the policy, and the other the value of the goods in the market. I think the agreed value between the insurers and the owners was absolutely immaterial as against the defendant. That basis failing, the market value, which was the only other suggested, must be adopted, and on that basis the damages were excessive by £159 12s. 7d. In my opinion the only order on this appeal should be that the damages be reduced by £159 12s. 7d. With respect to the costs, under all the circumstances of the case I think there should be no costs

of the appeal.

HARDING, J. : The Government's punts, through negligence on the part of their servants, came into collision with and fouled the lighter "Telephone," which was properly moored and laden with wool, the property of the Bank of Australasia, Limited, and thereby damaged some and destroyed other part of such wool.

The bank subsequently assigned to the plaintiffs the causes and rights of action in respect of the collision, and the loss and damage occasioned thereby to the wool, which it had against the Government of Queensland.

Under these circumstances the plaintiffs have in this action and in their own name sued the defendant (the nominal defendant appointed by the Government) for such damage, and have received judgment therefor.

The defendant now moves to set aside such judgment on the ground that the assignment being merely of a right to recover, is illegal, and confers on the plaintiffs no right of action in their own name against the defendant. *The Judicature Act*, s. 5 (6) allows the assignment of "a legal chose in action," and thereby transfers to the assignee the legal right to the chose in action and all legal and other remedies for the same, which necessarily include the right to sue in the name of the assignee.

The question for decision therefore is, Is this right to recover assigned to the plaintiffs a "chose in action" within the meaning of that section? If it is, the judgment must so far be sustained. By section 5 (6) the chose in action is the assignee's as though it had been his from the beginning—he consequently can sue for it in his own name.

That the right to recover is a chose in action there is no doubt. Again, there are two classes of choses in action : (1) Those which are transmissible by operation of law, and (2) those which die with the party, which may be shortly described as personal torts. The present case falls within the first class; the second may consequently be discharged from further consideration.

By 4 Ed. 111, c. 7, the same action was given to the executor for any injury done to the personal estate of the deceased in his lifetime, whereby it became less beneficial to the executor, as the deceased himself might have brought in his lifetime, an enactment which includes all "choses in action not being personal torts. It is clear, therefore, that the right to recover assigned to the plaintiffs was transmissible by operation of law. The right to recover in this case is not in respect of a personal tort, but as it is a "chose in action" it must therefore belong to the first class, and be such that it is transmissible by operation of law. Choses in action belonging to this class have always been assignable. As an example take the dicta of Bosanquet, J., and Park, J., in *Stanley v. Jones* (7 Bing. 369, at p. 375), to the effect that "a claim for damages on running down a ship might be assigned"—as nearly as possible the case in question. This proposition that choses in action which transmit by operation of law are assignable has been the subject of actual discussion in many cases in the United States (see the cases collected in 1 U.S.D., 1st Series, p. 771), and many particular instances are afforded in the cases cited in the argument. The right to recover sued on in the present action is therefore a "legal chose in action" within the meaning of *The Judicature Act*, s. 5 (6) and on this ground the motion must be refused.

As to the damages, they must be reduced by the difference between the market value (£364 9s. 10d) and the insured value (the amount included in the judgment), which amounts to £159 12s. 7d., or the action must be sent back for re-assessment of damages. The defendant having failed on the principal ground, there should be no costs on either side.

CHUBB and REAL, J.J., concurred with the judgment of GRIFFITH, O.J.

Solicitors for plaintiff: *Macdonald-Paterson* and *Hawthorne*.

Solicitor for defendant: *J. Howard Gill*, Crown Solicitor.

WHITE v. RUSSELL.

Practice—Specially indorsed writ—O. XIV, r. 1a—Interest.

A special indorsement claiming interest must show that the interest is payable either by law or by a contract between the parties on the sum in respect of which it is claimed.

A claim on a *quantum meruit* may be made the subject of a special indorsement.

A writ of summons was indorsed with a claim for £55 10s. for board and lodging and money lent, and for £45 10s. on a promissory note, and £16 2s. 6d. interest thereon from the date of writ till judgment. There was also a claim for interest at 8 per cent. on "£45 10s., part of the above sum," until judgment.

Held, overruling the decision of CHUBB, J., that the indorsement was sufficient.

APPEAL from an order of CHUBB, J., dismissing a summons for final judgment on the ground that the writ was not specially indorsed within O. III, r. 6, inasmuch as it did not appear on what specific part of the debt interest was claimed.

GRIFFITH, C.J.: It is settled that a special indorsement claiming interest must show that interest is payable either by law or by a contract between the parties on the sum in respect of which it is claimed. In this case the indorsement on the writ shows that interest was payable by law on £45 10s., part of the claim. It then goes on to say that the plaintiff claims interest at a proper rate on that precise sum. That is, he claims interest on the precise sum on which he is entitled by law to claim it. It is objected that the identity of the sum on which interest is payable with the sum on which it is claimed does not appear. I think that it sufficiently appears that the plaintiff is entitled by law to interest on the sum on which he claims it. I think therefore that the indorsement is good. It was then objected that a writ cannot be specially indorsed on a *quantum meruit*. I do not think that there is anything in that objection.

(The Court then heard the case on its merits, and made an order giving leave to defend. The costs of the appeal were made plaintiff's costs in the action.)

Solicitor for plaintiff: *Bunton*, agent for *Jarvis and Turner*.

Solicitor for defendant: *Hellicar*, agent for *Marsland and Marsland*.

CIVIL COURT.

HARDING, J.

18th December, 1894.

MUNICIPALITY OF GLADSTONE v. O'NEILL.

Valuation and Rating Act of 1890 (54 Vic., No. 24), ss. 5, 47, 48—Local Government Act of 1878 (42 Vic., No. 8), ss. 199–208—Rates—Liability of infant.

An infant, who becomes the registered proprietor of land, is liable for all rates levied on such land, including rates due at the time of the purchase.

SPECIAL CASE.

The Municipality of Gladstone sued the defendant for arrears of rates. The defendant, who was an infant, had been the registered proprietor of the land, on which the rates were charged, since 80th November, 1890. The previous proprietor had never paid any rates. The questions for decisions were whether the defendant was liable to pay any rates, and, if so, whether the liability extended to the whole of the rates due, or only to the rates due since the purchase.

Fees for plaintiff.

MacDonnell for defendant.

HARDING, J.: This is a special case which raises a question of law under the following circumstances: Fraser and Co. were the registered proprietors of certain pieces of land, situated within the municipality of Gladstone. In the year 1890 they transferred this land to the defendant, never having paid any rates. No one has ever been in actual occupation of this land. Rates have been levied by the municipality from the year 1865 up to December 31, 1893, but have never been paid. The defendant is at the present moment an infant under the age of 21. The question for decision is whether all those rates are recoverable, and whether they are recoverable against this particular defendant, an infant, by an action in this court. The question asked in this case is whether the defendant is liable to pay to the plaintiff the whole of the rates. Now, in the case of the *Municipal*

Council of Rockhampton v. Bennett (1 Q.L.J. 25) I decided on *The Local Government Act of 1878* that that section is retrospective, and that it rendered rates which before the passing of the Act were a charge upon property recoverable against the owner of such property, with interest thereon. That carries this case up to the period of the passing of *The Local Government Act of 1878*. At that time Fraser and Co. were liable for these rates. Then after that *The Local Government Act of 1878* was repealed by another Act, which made certain provisions for the making of rates from that time, and it continued in operation until the passing of *The Valuation and Rating Act* in 1890. The effect of sections 199 to 208 of *The Local Government Act of 1878* was that although the rates might not be recoverable after a certain lapse of time, under certain circumstances, against the owner or occupier, yet they still continued a charge upon the land. Then, in 1890 *The Valuation and Rating Act* was passed, which by paragraph 8, section 5, indicates that all rates which having accrued due in any existing district, are at the passing of the Act due, leviable, and payable, shall be and continue to be so due and leviable, and may be paid, received, levied and recovered by the local authorities under the provisions of the Act. Now at that time the rates were due and leviable, and section 47 enables them to be recovered by action in this court. That action has been brought, and by sections 5 and 48 it would seem that the rates levied in the interval between the *Local Government Act of 1878* and the *Valuation and Rating Act of 1890* are revived as against the owner or occupier, so that if the defendant is liable at all, he is liable for the whole of the rates sued for. He answers that he is an infant, and with respect to that considerable argument has been had before me. The case is not devoid of authority. It seems that an infant who has the benefit of land to which a duty is attached must perform that duty. So long ago as the time when Coke wrote his "Second Institute," he laid it down (p. 708 section 5) that an infant that has his house or land, by descent or purchase,

is liable to this public charge, and so is the husband of a *femme covert*, to public charge of rates. In *Bacon's Abridgement* (vol. 4. p. 849), it is also laid down that if an infant be a tenant by courtesy, or a lessee for life, or for a certain number of years, of lands, and repairs are necessary, the infant is obliged to repair in the same manner as if he were of full age. In the *King v. Sutton* (8 A. and E., 579-611), Lord Justice Denman quoted Lord Coke's dictum that an infant was liable if he have the use of the land by descent or purchase, and in the last edition of *Simpson* (p. 81) writing on the rents and other services to which an infant is liable, the same view is taken. The last case which I think it necessary to mention, is that of the *London and N.W. Railway Company v. M'Michael* (20 L.J. Ex. 97) where it was held that an infant, being a shareholder in a railway company, is liable for an action for calls until he waives or repudiates the ownership of the shares. Therefore, to such an action, the simple plea of infancy was held to be bad. It was also held in that case that the plea that an infant had never ratified the purchase, and that the shares were wholly useless to him, did not free him from the obligation to pay calls. Now, in this case, the infant has not disclaimed the purchase, although that disclaimer could be revoked when he came of full age. If he had disclaimed, possibly the case I have cited might be an authority that the remedy of the plaintiff should be suspended until the defendant came of age, when he might or might not recall his disclaimer. That seems to be very much what is meant in the case of *Evelyn v. Chichester* (8 Burr, 1717), where it was held an action for fees upon an infant copyholder would lie when he came of age. It does not decide that it does not lie before or after. If it did lie before it would or would not be suspended by the disclaimer before. On all those cases which are the English authorities upon the question I have arrived at the conclusion that the defendant is liable. There is a case of *Crick v. Murray* (8 N.S.W., r. 20), decided by the Supreme Court of New South Wales, a court for which we have the highest respect. There the plaintiff sued the

defendant, an infant, under the *Fencing Act* (9 Geo. IV., No. 12), for a portion of the cost of a dividing fence between the plaintiff's land and a conditional purchase made by the defendant before the passing of the *Lands Act Amendment Act, 1875*. It was held that with respect to the erection of a fence, sums of money which should have or might be expended or laid out under the provisions of the Act should be recoverable as for money laid out for the benefit of the owner or owners of such land, merely giving the private right to a certain person if he did a certain thing to recover money as money laid out for the benefit of the owner of the land. There was nothing in the nature of a public duty in that matter, or with respect to the onus of the land to the performance of the public duty—that is to say, the duty of paying rates for the maintenance of that part of the country in which the lands are situated, so I think that case is entirely distinguishable from the English cases cited, and without saying it is rightly decided or not, all I have to say is, that in my opinion, it is not an authority to over-ride the authorities which I have cited. Upon the whole, I think that plaintiffs are entitled to recover, and the questions submitted must be answered so that the plaintiffs will have judgment for the full amount claimed. The order will be judgment for the plaintiffs, and let the plaintiffs have the costs of the summons for final judgment as the costs in the action.

Solicitors for plaintiff: *Winter & McNab*.

Solicitors for defendant: *Chambers, Bruce & McNab*.

IN CHAMBERS.

GRIFFITH, C.J. 2nd February, 1895.

Re WATSON, A LIQUIDATING DEBTOR.

Insolvency Act of 1874 (38 Vic., No. 5), s. 202, subsec. 12, r. 200; s. 145, r. 194—*Adjudication after petition under s. 202 for liquidation by arrangement.*

Section 145 of *The Insolvency Act of 1874* does not apply to liquidation by arrangement. A distraint under *The Distress, Replevin and Ejectment Act of 1867* is not a "legal process" under r. 194.

APPLICATION on behalf of debtor, after presentation of petition for liquidation by arrangement, for adjudication in order to protect his assets for the benefit of his creditors.

J. N. Robinson, on behalf of the debtor, read an affidavit setting out that after the presentation of the petition for liquidation by arrangement, but before the first meeting under the petition, the debtor's landlord put in a distraint for rent, and that the sale of debtor's goods under the distraint would injure the other creditors. He submitted that as sec. 145 of *The Insolvency Act*, which prevents a landlord from distraining after adjudication, does not apply to liquidation by arrangement, and as a distraint under *The Distress, Replevin and Ejectment Act* is not a legal process under r. 194 of *The Insolvency Act* (he cited *Re G. H. M. Addison*, Real, J., 11th November, 1891, unreported), that the adjudication asked by the debtor was the only means of protecting the interests of the other creditors.

GRIFFITH, C.J.: I am of opinion that sec. 145 does not apply to proceedings for liquidation. I agree with Real, J., that distress is not a legal process within the meaning of r. 194. I make the order of adjudication, but stay proceedings under it until after the first meeting in the liquidation.

Solicitors for debtor: *J. N. Robinson & Co.*

GRIFFITH, C.J.

6th February, 1895.

BANK OF AUSTRALASIA v. HENRIETTA LEVY.

Evidence required of separate property of married woman on summons under Q. XIV.

The giving of a guarantee by a married woman for her husband's account at a bank is evidence of a representation to the bank by her of her having separate estate, and is therefore as against her *prima facie* evidence of her having such estate.

APPLICATION for final judgment in an action against a married woman on a guarantee given by her to secure an overdraft to her husband.

Shand, for plaintiffs, applied for final judgment and read an affidavit in support of his application.

Leeper, for the defendant, submitted that the affidavit was defective in that (1) it contained no evidence of defendant's separate estate; (2) there was no evidence of the indebtedness of the principal debtor; and (3) that the guarantee was not annexed to the affidavit in support, and asked that the summons might be dismissed. He cited *Annual Practice* (1894) p. 326, and *Miles v. Fitzgerald* (4 Q.L.J., 157).

GRIFFITH, C.J., overruled the second and third objections.

Shand submitted that the defendant was sued as a married woman having separate estate, and that the indorsement referred to her as the "within-mentioned defendant," and that there was therefore sufficient evidence of separate estate, and cited *May v. Chidley* (1894, 1 Q.B. 451).

GRIFFITH, C.J.: The writ describes the defendant as a married woman having separate estate. The indorsement refers to the "within-named defendant." I am of opinion that the mere fact that a married woman gives a guarantee to a bank for her husband's account is evidence of a representation by her to the bank that she has separate estate. I think, therefore, that the indorsement on the writ considered as a pleading is sufficient, and that there is *prima facie* evidence as against her of the existence of separate estate.

Judgment as in *Scott v. Morley* (20 Q.B.D., 120), with costs.

Solicitors for plaintiffs: *Hart, Flower & Drury*.

Solicitor for defendant: *R. J. Leeper*.

FEBRUARY SITTINGS OF THE FULL COURT.

REGINA v. CONNELL.

Criminal law—*Embezzlement*—*Incorporation of company*—57 Vic., No. 1.

The Court will take judicial notice of the existence of an incorporated company mentioned as such in a statute. On a charge of embezzlement from such a company it is unnecessary to prove its incorporation.

Crown case, reserved by Noel, D.C.J.

The prisoner was charged at Croydon with embezzling the funds of the Queensland National

Bank, Limited. No evidence was given of the incorporation of the bank. The learned judge refused to direct on that account that there was no proof that the prisoner was employed by the Queensland National Bank, Limited, and that there was no proof of the existence of such an institution.

The prisoner was convicted, but the points were reserved for the Full Court.

Power, for the Crown, cited *Regina v. Langton* (2 Q.B.D., 296).

Ball for prisoner.

As there was some doubt whether the word *limited* was contained in the information describing the bank, the case was referred for amendment.

GRIFFITH, C.J.: By the case as now amended it appears that the prisoner was indicted for embezzlement as a servant of the Queensland National Bank, Limited. The evidence showed that he was in the employ of the Queensland National Bank, Limited, as teller. The point taken by the prisoner's advocate was that there was no evidence that the Queensland National Bank, Limited, was a duly incorporated joint stock company. What conclusion might be come to apart from the statute 57 Vic., No. 1, it is not necessary to say. That statute recognised the institution called the Queensland National Bank, Limited, as a duly incorporated joint stock company carrying on business in Queensland. That is an Act of which the court is bound to take notice. It appears to me that the statute completely answers the objection, and the conviction must be affirmed.

HARDING, J.: To support a charge of embezzlement it is necessary to prove the ownership of the property embezzled. Now the owner of property is either an actual or an artificial person having power to deal with it—actual such as a human being, artificial such as an entity constituted and enabled by law to deal with it. In no other way can property form the subject of ownership. A dumb animal cannot, nor can an inanimate thing own property. A number of persons cannot nor can a single person not incorporated or so enabled

by Act of Parliament own property by a name. It belongs to them or him jointly and severally as the case may be. If a man transfers his property to an inanimate thing, it does not pass to that thing. In the present case it was not at first stated that the Queensland National Bank was a company incorporated or otherwise able or entitled to hold property by the name of the Queensland National Bank. As the case was left it might have been simply a trade name or an individual or a number of persons unincorporated. Consequently, the ownership of the property would not have been found, and the prisoner would have been wrongfully convicted, there being no evidence that such an institution existed in law. As the case has come back it appears from the information that the prisoner was charged as the employé of the Queensland National Bank, Limited, and that it was the property of that bank and not of a company called the Queensland National Bank he was charged with embezzling. The Judge's notes of the case show that there was evidence of those facts, and of the bank as carrying on business. The production of the certificate of incorporation is not necessary when it is found that the company has carried on business as such. The court takes judicial knowledge of the existence of the Queensland National Bank, Limited, as an incorporated company, the company being recognised by statute as such. The company being in existence and the prisoner engaged as an employé of that company, there was consequently evidence to go to the jury that the company in respect of whose money he was charged with having embezzled was the same company as that mentioned in the Act of Parliament 57 Vic., No. 1.

REAL, J., concurred.

Conviction affirmed.

Solicitor for prisoner: *F. J. Lyons*.

PHILLIPS v. DOWZER.

Impounding Act of 1863 (27 Vic., No. 22), ss. 40, 52—Damages Jurisdiction—Title to land.

On a complaint under s. 40 of *The Impounding Act of 1863*, for illegally impounding cattle, the justices have jurisdiction to inquire whether the defendant was in occupation of the land on which the cattle were alleged to be trespassing, and to decide such incidental questions of title as are necessary for the determination of that question.

ORDER *nisi* calling upon Herbert Phillips, G. L. Lukin, P.M., and G. Stuckey, M. Stevens, and J. Forbes, justices of the peace, to shew cause why a conviction or order made on 6th December, against James Dowzer, at the Tiaro Police Court, under sec. 40 of *The Impounding Act of 1863*, for having illegally impounded certain cattle belonging to Phillips, should not be quashed, on the grounds—(1) That the Police Magistrate and justices had no jurisdiction to make the order, as a question of title to land was involved; (2) that on the admitted facts the agreement for lease under which complainant held the land from which the cattle were impounded had become liable to be avoided, and that the defendant had actually entered and avoided it, and was in actual possession of the demised premises at the time of the alleged illegal impounding.

The complainant was the lessee under an agreement with Dowzer of certain land, which it was alleged he undertook to utilise as a dairy farm. Dowzer being dissatisfied with the manner in which he was dealing with the property, served him with a notice that he intended to retake possession. About two months after notifying that intention he sent an agent to take possession. The agent found no one in the house, and proceeded to occupy it. The complainant returned while he was there, and ordered him to leave, and he did so. Dowzer considering that he had retaken possession of the land by the course of action which he had adopted, had certain of the complainant's cattle impounded as trespassing on his property. The complainant, denying that his landlord had retaken possession, sued him in the Tiaro Police Court for having illegally impounded

his cattle. Dowzer then tendered a Crown grant of the land in his favour as proof of his ownership of the land, and claimed that as a question of title to land was involved the magistrates had no jurisdiction to hear the case. The objection was overruled, and the bench gave judgment in favour of the complainant.

Shand, for the respondent, submitted the appeal ought to have been to the District Court (sec. 52). The objection was overruled.

Powers, for the appellant, submitted that by the re-entry possession reverted in the landlord, and that he had the right to impound cattle straying upon the land. (C.A.V.).

GRIFFITH, C.J.: This was an order nisi for a quashing order to quash an order by which the defendant Dowzer, the present appellant, was ordered under sec. 40 of *The Impounding Act* to pay to the owner of certain cattle compensation, on the ground that he had wrongfully impounded them, and also to make certain other payments, and refund the impounding fees. The order made by the justices was impeached on two grounds—(1) That a question of title arose, and the jurisdiction of the justices was therefore ousted; and (2) that upon the admitted facts as they appeared before the justices, the defendant, who impounded the cattle, was entitled to possession of the land from which the cattle were impounded. The first ground assumed that the jurisdiction of the justices to entertain a complaint under sec. 40 was ousted when a question of title to land arose. This court expressed the opinion in the case of *Gould v. M'Nairn* (6 Q.L.J., 171) that *The Impounding Act* was intended to be a code of impounding law. The question then under consideration arose under sec. 36, and the court held that proceedings for a penalty for unlawful impounding might be taken under that section against any person who impounded cattle under circumstances under which he was not justified in impounding them under that Act. A *bona fide* claim of right would, no doubt, be a defence under that section, which was a penal section. The present proceedings were taken under sec. 40. The right to impound

is declared by sec. 36, which provides that "any proprietor upon whose land any animals are found trespassing, may drive the same to the nearest public pound." The only person who can impound is a proprietor, and a proprietor is defined to be "any holder or occupier of land under whatever tenure, or any superintendent, overseer, or other duly authorised person acting for and on behalf of any such holder or occupier." So that the first ingredient is, as indeed at common law, that a person who seeks to impound must be the occupier of the land. Of course there might be a constructive occupation if there was no actual possession, and then the constructive occupation would follow the title. Another essential condition is that the animals must be found trespassing. That is the summary remedy which the law allows to the occupier of land by way of redress for trespass. But the statute also allows an appeal from that summary remedy to justices. That is conferred by secs. 39 and 40. Sec. 47 must be read for the purpose of construing sec. 40. It provides that every person who rescues any animals lawfully impounded shall be liable to a penalty. I am of opinion that the word "lawfully," used in sec. 47, conveys the same idea as the expression "legality of the impounding" in sec. 40, and means the converse of what is meant by the words "if it appears that the impounding was illegal," in that section. And I think that the justices having this jurisdiction given to them to inquire whether the impounding is legal or illegal, necessarily have authority to make any inquiry that may arise incidentally and which it is necessary to answer before they can come to a correct conclusion. In the case of rescue there is no doubt on the authorities that the justices must inquire into the lawfulness of the impounding, even although incidentally it may involve a question of title. In all cases of alleged illegal impounding the title to land must be involved to the extent of inquiry whether the person who impounded was in possession of the land. That was ordinarily, however, a question of fact. Another question necessarily involved is whether

the cattle were trespassing. If the cattle were lawfully on the land with the consent of the man who impounded them, they would not be trespassing. Questions of title might thus arise, but it would be only incidentally. Certainly, in my opinion, the justices have jurisdiction, in a case under sec. 40, to inquire whether the person who impounded was in possession, and whether the cattle were trespassing, and to decide all incidental questions of title necessary to enable them to answer those inquiries. In the present case, on the evidence, it appears that the owner of the cattle was in physical possession of the land. The defendant who impounded them claimed that he was in constructive possession of the land—that he had been the landlord of the owner of the cattle; that the lease had become forfeited for breach of conditions; and that he had re-entered some days before the impounding took place. That might have been evidence of a constructive possession sufficient to support an action for trespass, but it is not actual possession, and I think it is quite clear that a mere constructive possession such as that alleged would not authorise the person who had it to impound the cattle of a person who was in actual possession of the land, as distinguished from a mere casual trespasser. I think, therefore, that in this case the justices had jurisdiction to inquire into such questions of title as were raised, if, indeed, the questions raised were really questions of title. They had to inquire whether the defendant Dowzer was in possession of the land. It was admitted that he was not in actual possession. Then he said he was in constructive possession of the land, and thereupon they would have had to inquire whether he was in constructive possession, if it were a material point. I do not think it was. I do not think that constructive possession under such circumstances would justify impounding; but if it would, it would have been necessary for the justices to inquire into the alleged constructive possession in order to decide whether the impounding was lawful or not. Assuming that they had to inquire into the constructive possession, it could only have

arisen if there had been breaches of conditions, followed by re-entry. Upon the evidence I think that they might have properly come to the conclusion that there had been no breach of conditions which would justify a re-entry. On both points it seems to me that the objections fail, and that the order of the justices was right. The order *nisi* should be discharged with costs.

HARDING, J.: The power to impound is given by section 36 of *The Impounding Act*. That section, so far as it was necessary for me to read, is, "Any proprietor upon whose land any animals are found trespassing may drive the same to the public pound nearest by a practicable road or highway to the land where the same were trespassing." The 'proprietor' is defined in the interpretation clause as "any holder or occupier of land under whatever tenure." Shortly, the proprietor is the holder or occupier. The justices having under section 36 to decide the fact whether the man was a holder or occupier, there was no necessity for them to investigate the title. The plaintiff sued under section 40 for illegal impounding. The defendant impounded the plaintiff's cattle, and in order to have been entitled to do so he should have been an occupier, and have complied with the provisions of the Act. The justices convicted him of illegally impounding, and as I have said, it was for them to decide whether he was or was not the occupier of the land. There was evidence for and against that proposition, and their decision should not be interfered with. So far no question of title was involved, and the rule should be discharged with costs.

REAL, J.: I am of the same opinion, taking, of course, as I must, the case of *Gould v. McNairn* to have been properly decided. In that particular case—whilst I fully agreed with the principle laid down by the Chief Justice now that the justices have jurisdiction to inquire into the incidental matters necessary to determine the question in issue—the question was whether the Act was intended to apply, as stated by my brother Judges, as a code of the impounding law, or whether it was intended, according to the view taken by my-

self, to deal with a certain class of trespass, in which there was no dispute as to ownership. The view I took owing to the word "proprietor" being used, and it being used in all sections, was that the language of the Act was such that the word "proprietor" could not be read with the wide sense of "any person," and consequently, having that limited meaning, it was only intended to apply to cases where there was no question that the owner of the land had the right to impound. The court has given a wider interpretation to the clause, and has no doubt established a more convenient and perhaps more equitable system of law. That being so, it follows that the principle has also to be extended, whereas if my view was correct, the only question necessary to enable the justices to determine the question in issue would be, Was the manner of the impounding correct? It now, however, becomes necessary to determine whether, in fact, the man was an occupier, or was a person who could impound under the provisions of the Act, and if not, it is in accordance with the decision in *Gould v. McNairn* that he should be subject to be dealt with in the manner prescribed by the Act, and the person injured is not compelled to have recourse to any other court than that provided by the Act. I am of opinion, with my brother Judges, that this appeal must fail, and the rule must be discharged, with costs.

Solicitors for appellant: *J. N. Robinson & Co.*

Solicitors for defendant: *T. O'Sullivan.*

MARCH SITTINGS OF THE FULL COURT.

KEOGH v. BLAKE.

Prohibition—District Courts Act 1891 (55 Vic., No. 33), ss. 120-123—Interpleader—Amount under £10—Scale of costs.

The District Court Rules do not provide any scale of fees for cases under £10.

Held, that a District Court Judge has no power in such a case to order the costs of the successful party to be taxed on any scale.

Semle, that he has power to order the unsuccessful party to pay a fixed sum for costs.

ORDER *nisi* for a prohibition in respect of so much of an order of Paul, District Court Judge, as ordered the costs of an interpleader summons where the amount in dispute was under £10 to be taxed on the scale prescribed for claims between £10 and £30.

The facts appear fully in the judgment of the learned Chief Justice.

Macgregor, for the claimant, to move the order absolute.

Lukin, for the execution creditor, to show cause.

GRIFFITH, C.J.: This is a rule *nisi* for a prohibition in respect of so much of an order made by his Honour Judge Paul at the District Court, Ipswich, in the matter of an interpleader summons, as ordered the claimant to pay the costs of an interpleader summons on the scale for claims between £10 and £30. The claim made by the claimant included property to the value of more than £10. The bailiff sold the property and paid the money into court, and then took out an interpleader summons, which called upon the claimant to state particulars of his claim. He stated them, specifying the goods which he claimed—which, as a matter of fact, had then been sold for a sum amounting to less than £10—£9 18s. 9d. Having regard to the rules of the District Court regulating interpleader proceedings, I think that the matter in question before the judge was the proceeds or value of the goods included in the claimant's particulars—that is, the goods which had been sold for £9 18s. 9d. There was no dispute as to the value of the goods; the claim was to the proceeds. I think, therefore, that the amount in question was under £10. The question is whether under these circumstances the judge had power to award costs to be taxed on the scale provided for cases of claims between £10 and £30. Section 120 of *The District Courts Act* provides that "Except where herein otherwise provided, the costs of any action or proceeding shall be paid by or apportioned between the parties in such a manner as the judge directs." The judge, therefore, has discretion over costs, except so far as his discretion is controlled by the Act. His discretion

is controlled by the following sections:—S. 121 provides that "Except as hereinafter provided, all costs and charges as between the parties shall be taxed by the registrar of the court in which they are incurred. And no costs or charges shall be allowed on taxation which are not sanctioned by the scale of costs then in force." S. 123 provides that "In any action the judge may give judgment for costs in a fixed sum not exceeding £30." If these sections stood alone it would appear that in any action, no matter for what amount, whether under or over £10, the costs are in the discretion of the court. The judge may order the payment of a fixed sum, or if he does not make any order of that nature he may order the costs to be taxed, but the taxation must be in accordance with the scale of costs in force. So far there is no limitation in the Act itself as to the amount of costs. S. 122 provides that professional costs shall be in accordance with the scales prescribed by the rules of court. It also contains a provision that in actions for the recovery of money in which the sum sued for does not exceed £10, no greater amount will be allowed for professional fees than if the action had been brought in a Small Debts Court. The Rules establish six scales of fees, of which the lowest is applicable where the amount recovered by the plaintiff or obtained from the defendant exceeds £10 or does not exceed £30. There is no scale of costs where the amount recovered by the plaintiff or obtained from the defendant is less than £10. I have come to the conclusion—reluctantly, I confess—that under these circumstances the judge cannot in this case, the amount in question being under £10, order the costs to be paid according to any scale, or to be taxed on any scale, because taxation must be on some scale sanctioned by the rules of court. There is no such scale applicable to cases under £10. If the judge had power to award costs, and I am inclined to think he had, it was under section 123, which gives him power to allow a fixed sum. I think that the judge had no power to order costs to be taxed on any scale, and that the rule should be made absolute.

HARDING, J.: The facts have been sufficiently stated. Sec. 122 directs certain scales to be prescribed by the Rules. The Rules have prescribed scales applicable to sums recovered between £10 and £20, £30 and £50, £50 and £100, and so on, but not below these sums. These scales are for the use of the registrar when taxing. Under s. 120 the costs are to be apportioned between the parties as the judge directs, and if there is no direction they are to abide the event. Here there has been a direction. The claimant has been directed to pay the costs on the scale between £10 and £30. There is no scale, according to the Rules, applicable where the sum recovered is under £10, and by s. 121 no costs are to be allowed on taxation which are not sanctioned by the scale of costs. The judge has directed the scale between £10 and £30 to be used, but s. 121 requires the scale to be prescribed by rules of court. None having been so prescribed by rule, the judge cannot from time to time prescribe them, and consequently the direction was wrong, and the rule should be made absolute as to so much of the judgment as directs the costs to be on the scale between £10 and £30, with costs against Keogh.

REAL, J.: I am of the same opinion, and I desire to add nothing to the judgment of my brother judges.

GRIFFITH, C.J.: The rule will be made absolute as to so much of the order as awarded costs on the scale between £10 and £30.

Solicitor for claimant: *P. A. O'Sullivan*.

Solicitor for execution creditor: *McGill*.

IN CHAMBERS.

GRIFFITH, C.J.

8th March, 1895.

Re CAMERON'S GOODS.

APPLICATION to pass accounts and to dispense with filing further accounts.

Chambers, for the administrator, asked to pass accounts and to dispense with further accounts.

It appeared that all the estate had been administered save the sum of £15 15s. included by the administrators in their account for costs of passing the accounts, which sum had been disallowed by the Registrar in his certificate.

The Chief Justice sent for the taxing officer, and upon learning from him that the taxed costs of the administrator of passing the accounts in question would probably exceed £15 15s., made the following order:—Pass accounts as certified by the Registrar. Allow costs at £15 15s. Dispende with further accounts.

Solicitors for administrator: *Chambers, Bruce & McNab.*

GRIFFITH, C.J.

8th March, 1895.

In re NEWMAN-WILSON, A LUNATIC.

MACALISTER v. NEWMAN-WILSON.

Order as to defence of action against insane defendant.

Application by a committee for advice as to defending an action pending against a lunatic.

GRIFFITH, C.J., gave leave to defend the action to the extent of delivering a statement of defence to the effect of that used by an infant defendant in Equity before the Judicature Act (*Levis* 847, see below). Costs of this application and defence out of estate.

Answer of infant.

"I am an infant of the age of years, and without admitting all or any of the matters and things in the said Bill alleged and set forth, I submit my rights and interests in the matters in question in this cause to the protection of this Honourable Court."

Solicitors for the committee: *Forston & Cardew.*

BRISBANE CRIMINAL SITTINGS.

HARDING, J.

15th March, 1895.

REGINA v. VOS AND OTHERS.

Criminal law — Jurisdiction — Judicial notice—

Pacific Islanders Protection Act 1872 (35 and 36 Vic., c. 19), s. 9—38 and 39 Vic., c. 51, s. 6.

On an information against certain prisoners for an alleged breach of s. 9 of 35 and 36 Vic., c. 19, a question arose whether the island of Malayta was part of Her Majesty's dominions or within the jurisdiction of any civilised Power. The presiding judge directed a letter to the Governor of Queensland, and received a reply that it was not, but that it was under the protectorate of Her Majesty the Queen. From an Order-in-Council, under s. 6 of 38 and 39 Vic., c. 51, setting out the limits of dominion, it appeared that Malayta was not part of Her Majesty's dominions, nor within the jurisdiction of any civilised Power.

HARDING, J., held he had sufficient information to take judicial notice of the position of the island, and decided that the court had jurisdiction to try the information.

INFORMATION against Joseph Vos, George Thomas Olver, Michael Joseph Curry, Alfred Cuthbert Hall, Arthur Absalom, and Alfred Dowsett, under 35 and 36 Vic., c. 19, s. 9.

Byrnes, A.G., Power, and Lukin, for the Crown.

Fee: for the prisoners.

Byrnes, A.G., before opening the case for the prosecution, stated that the question of the extent of Her Majesty's dominions would probably arise, and submitted a reference should be made to His Excellency the Governor, as Her Majesty's representative in the colony, to inform the court whether the island of Malayta was within Her Majesty's dominions or within the jurisdiction of any civilised Power. Reference was made to *Mighell v. Sultan of Johore* (1894, 1 Q.B., 149); *re Carlo Pedro* (5 Q.L.J., 22); *Taylor v. Barclay* (2 Sim., 221); *Foreign Jurisdiction Act, 1890* (53 and 54 Vic., c. 37), s. 4.

The jury were then impanelled.

At a later stage in the case Harding, J., directed a question for the Governor, "Is the island of Malayta, which is an island in the Pacific Ocean, within Her Majesty's dominions, or within the jurisdiction of any civilised power?" A reply was received in the negative. A copy of the *Queensland Government Gazette*, dated the 21st May, 1892, containing the regulations under *The Pacific Island Labourers Acts*; a copy dated 31st August, 1872; and a copy dated 16th November, 1875, containing a proclamation of 35 and 36 Vic., c. 19, were put in evidence.

Fee: submitted there was no case to go to the jury, and asked for a direction to the jury to

return a verdict of not guilty against all the prisoners, on the ground that there is no evidence that the island of Malayta is not within Her Majesty's dominions, nor within the jurisdiction of any civilised Power; and also on the ground that there was no evidence that the islanders or any of them were carried away without their consent. He cited *Taylor on Evidence*, s. 17.

HARDING, J.: The question has arisen whether the island of Malayta is not in Her Majesty's dominions, and not within the jurisdiction of any civilised Power. Whether that is for me as a judge declaring the law, or whether it is a question of fact to be ascertained by the jury, has been raised by Mr. Feez. He has contended that it is not a matter of judicial knowledge, or amongst the things which are judicially taken notice of. The American writer, *Greenleaf on Evidence*, Vol. III, 282, whose book was taken as the basis of the English book by Taylor, one of the leading books on evidence has thus stated the matter. "The principle on which judicial notice is taken is the universal notoriety of the facts in question. These are sometimes distributed into two classes, composed of those things of which the court of its own motion takes notice, and those of which it does not take notice, unless its attention is directed to them by the parties." If the court is embarrassed, it may take or refuse to take judicial notice of a fact which forms one of the subjects of judicial cognisance, and unless the party calling upon the court to take such judicial notice produces the books and documents which satisfy him as to its existence. But the judge may inform himself of such facts in any way which he may deem best in his discretion, so that in this case I might have stopped the case until the Attorney-General had proved to my satisfaction the fact of which I am required to take judicial notice—namely, that these islands are not in Her Majesty's possession or within the jurisdiction of any civilised Power. I might have stopped the case until he had produced evidence of that, or I might have known it, and if I did not know it I might have informed myself in any way which I deem best in my discretion.

I am not obliged to take judicial notice of any of those matters of fact, but I am at liberty to do so at my discretion. The text writers say that the exercise of that discretion depends upon the nature of the subject usually involved, and the apparent justice of the case. I have taken two courses in this case, each for the purpose of satisfying myself, and they have both brought me to the same conclusion. I have a letter under the hand of His Excellency the Governor, Sir Henry Wylie Norman, signing himself, not only as Sir Henry Wylie Norman, but as Governor of Queensland, dated from Government House as late as the 12th March in this present year. His Excellency has informed me that he is able, from his official knowledge, to inform me that the island of Malayta is not part of the Queen's dominions, and not within the jurisdiction of any civilised Power, but that it is under the protectorate of Her Majesty the Queen. That, I think, alone would be sufficient for me to base my opinion on; but I further support my knowledge by reference to the *Pacific Islanders Protection Act of 1875*, being 38 and 39 Victoria, c. 51, section 6, which says, "It shall be lawful for Her Majesty to exercise power and jurisdiction over her subjects within any islands and places in the Pacific Ocean, not being within Her Majesty's dominions, nor within the jurisdiction of any civilised Power, in the same and in as ample a manner as if such power or jurisdiction had been acquired by the cession or conquest of territory, and by order in Council to create and constitute the office of High Commissioner in, over, and for such islands and places." In the case of *The King v. Daniel Holt* in 5 Term Reports, p. 436, at p. 442, it is stated that "the *Gazette* is of itself *prima facie* evidence of matters of State and of the public Acts of the Government. It is published by the authority of the Crown; it is the usual way of notifying such Acts to the public; and therefore is entitled to credit in respect of such matters. Lord Holt held it a high misdemeanour to publish anything as from royal authority which was not so. In a late case at Lancaster, upon an occasion similar to the present, Justice Buller held that the

Gazette is evidence of the King's proclamation contained therein. So it has been held by all the judges that the articles of war printed by the the King's printer are good evidence of such articles." Now, it being a high misdemeanour to publish as from the royal authority that which has not the royal authority for its publication, and anything of royal authority published by persons that have that authority and profess to publish by royal authority is receivable as evidence, I consequently turn to a publication of the English Government which on the bottom of it has "published by authority." This is a compilation of statutory rules and orders issued in the year 1893, and at page 312 I find the Pacific Order-in-Council of 1893. Now that order specifically recites the section of the Act which I have read, and that it is made in pursuance of that Act and other Acts. Consequently anything contained in that order and anything recited in the Acts of Parliament are to be taken by the courts to be facts. Now the Act which I have referred to (98 and 99 Vic., c. 51) has to be read and incorporated with 95 and 96 Vic., c. 19, which recites in the preamble that, "Whereas criminal outrages by British subjects upon natives of islands in the Pacific Ocean, not being in Her Majesty's dominions nor within the jurisdiction of any civilised Power, have of late much prevailed and increased, and it is expedient to make further provision for the prevention and punishment of such outrages." Therefore the Act of Parliament and the Order-in-Council were both made with the object of providing for places "not being in Her Majesty's dominions nor within the jurisdiction of any civilised Power." From that I take it that anything I find stated as a fact in this Order-in-Council is the law of the land, and is a fact recognised by our law. Now the Order-in-Council states that its limits shall be the Pacific Ocean and the islands and places therein, including certain mentioned, but exclusive, except as this order expressly provides by subsection 2, of any place for the time being within the jurisdiction or protectorate of any civilised Power. Consequently this order cannot apply to any place that is for the time being within the jurisdiction or protectorate of any civilised Power. Going on, I find that although the order had a much larger application than what I am going to read, yet it says in the sixth clause that jurisdiction under it shall be "exercised only in relation to the following parts of the limits of this order, that is to say:—1. The groups of islands, so far as they are not within the jurisdiction of the German Empire. . . . 2. Any seas, islands, and places which are not excluded by the fourth article of this order, and are situated in the Western Pacific Ocean, that is to say within the following limits: North, from 140 degrees east longitude by the parallel 12 degrees north latitude to 160 degrees west longitude, thence south to the equator, and thence east to 149 degrees 30 minutes west longitude; South, by the parallel 30 degrees south latitude; West, by the meridian 140 degrees east longitude." I have worked that out with the map which I had in court, and I find that this island of Malayta is within the specified limits. Consequently the order applies to the island, and by a subsequent section of the Act the jurisdiction to be assumed by any order is not to cover dominion by Her Majesty, so that the order on its face shows that this island is within its limits, and being within its limits the island itself to which it applies must be not a dominion of Her Majesty; and as the order is not to apply to a place for the time being within the jurisdiction or protectorate of any civilised Power, it must necessarily be outside the jurisdiction or power of any other State. I think, therefore, that on the law Mr. Feez's objection is overruled. The court must necessarily have notice of all things which its subjects must have notice of, and which they would be taken to have notice of at their own trial. Now each of these men in the dock has notice of the law, and is presumed to have actual knowledge of the law, and under this Act of Parliament and these regulations that is the law with respect to them. Now, could it for one moment be conceived that the prisoners are to know the law and

the judge is not? That conclusion would be absurd, and I think that the judge must be held to know this judicially. I sympathise to a certain extent with Mr. Feez in his argument that no metes and bounds have been proved. If a mountain had been mentioned, the court would have been unable without proof to ascertain what were the bounds of the mountain. But an island is land surrounded by water, and the moment one comes to the water they come to the limit of the land, and they can make no mistake, and the court takes judicial knowledge of that. I think that the court has such information before itself that it could find that island and the spot where this took place. So that I overrule Mr. Feez's main objection. As to the other point, that there is no evidence that the three islanders were carried away without their consent, the onus by the section under which they were being tried is thrown upon them. I think that if the Crown simply made a *prima facie* case of suspicion, the onus is thrown on the prisoners of clearing themselves and showing consent. I also agree that if the offence was committed by taking the islanders off the island, that that offence could be compounded afterwards, and that it would be necessary for the prisoners to show that the taking of these men from their islands was from the first inception with their consent. Whilst in the neighbourhood of the islands they were bound to be landed if after consenting they withdrew their consent. So that it is upon the prisoners right through. It was said with regard to Hall that there was no evidence of his connection with the transaction from the beginning to the last. I think there is evidence; the weight of it is of course for the jury. The prisoner Hall, having been mate on a ship, was a man in authority under the captain, and in authority over others when the captain was absent. I think that the fact that on a signal being made from the boats Hall went to these boats, and after he got to them, from his position as mate, it was his duty to satisfy himself of the state of affairs. I think that when Hall had persons under his command—sailors and others—whose lives were in his hands, he was in a place where he might be

attacked by natives and firearms, he ought at once to have satisfied himself of the position of affairs. Had he looked round it is scarcely possible to conceive but that he would have seen a man had been chopped in two parts of his body with an axe and was bleeding at the arm. Had he seen that, and it is for the jury to say whether he did or did not, it was clearly his duty to make inquiry into the case. If he did not, it was a *prima facie* case against him, and if he cannot discharge himself by showing that these men were there by their own consent—if the jury find these facts—why necessarily, a verdict of guilty follows. With regard to the prisoners Absalom and Dowsett, it is said that there is no evidence that they took part in the carrying away of these boys, or aided and abetted or counselled or procured the commission of the offence. No doubt there is evidence, but the weight of it is for the jury. They were sailors in the ship, boatmen in the boat, and under the command of others. So far they would probably only come in as accessories, unless it were proved that they knew the actual scheme to steal the men and they were actually taking part in it. But if they came as aiders and abettors and accessories, then they must have known of the crime they were taking part in; and if they did not know, or how far they did know, would be matter of justification for them to the jury. With respect to the obeying of superior orders, if under the circumstances they thought or could have thought, or if the jury thought that they could have believed the persons commanding them were justified in ordering them to take away from these islands these men struggling and crying, and wounding their captors, well then they will go free. If the jury cannot think that they had any business to obey these superior orders, but ought to have at once thrown down their oars, and said, "We won't have any more to do with this," they would have to show consent on the part of the natives. Then, as to the prisoner Vos, there is direct evidence against him that Quisoolia offered to steal him men and he sanctioned it. If that is believed, well, there is ample evidence,

but it is for the jury to decide as to its weight. I have satisfied myself, for the reasons I have given, that there was some evidence. Before I dealt with each case I advised the jury that the weight and the true value of that evidence is for the jury, and I do not wish the fact that I have picked out pieces here and there to have any influence with them. The question of the facts will be for them in a future stage of this case. I am satisfied that there is evidence on these points to go to a jury. I have judicial knowledge of and have declared the status of the island. Mr. Feez, I overrule your objections.

The prisoners were subsequently acquitted.

Solicitors: O'Shea & O'Shea; Winter & McNab.

HARDING, J.

26th March, 1895.

REGINA v. KOVALKY.

Criminal law—Arraignment—Deaf mute—Insanity.

A person charged with murder was found mute by the visitation of God. A fresh jury was impanelled to try whether he was sane or not. Evidence was given that he had not sufficient intellect to understand the proceedings so as to make a proper defence, challenge the jurors, or comprehend the details of the evidence. HARDING, J., directed the jury, if they thought he had not sufficient intellect therefor, to find him insane. The jury did so, and the prisoner was ordered to be detained to be dealt with under *The Insanity Act of 1884*. *Regina v. Pritchard* (7 C. & P., 303) followed.

INFORMATION against August Kovalky for murder.

The prisoner, on being arraigned, stood mute.

A jury was impanelled to try whether the prisoner was mute of malice or by the visitation of God. Medical and other evidence was given, and the jury found that he was mute by the visitation of God. A fresh jury was then impanelled to decide whether he was insane.

Evidence was given that the prisoner was a deaf mute, and had not sufficient intellect to understand the proceedings of the court so as to make a proper defence, to challenge the jurors, and comprehend the details of the evidence.

HARDING, J., directed the jury on the authority of *Regina v. Pritchard* (7 C. & P., 303) that if they believed the evidence they should find the

prisoner insane. The jury found that the prisoner was insane and could not be tried on the information.

HARDING, J., directed the prisoner to be kept in strict custody in the Brisbane Gaol until he should be dealt with in the manner provided by *The Insanity Act of 1884*.

APRIL SITTINGS OF THE FULL COURT.

Re the will of MARTIN MACNAMARA, DECEASED.

Executors' and Administrators' accounts—Surcharges—Jurisdiction of court—Inquiries by Registrar—25 Vic., No. 13—Supreme Court Act of 1867 (31 Vic., No. 23), s. 23—Probate Act of 1867 (31 Vic., No. 9), s. 6—Costs.

The Supreme Court has authority, on passing executors' or administrators' accounts, in a summary way without action, to examine them and inquire whether they are accurate or erroneous.

The Registrar has authority to inquire and dispose of objections seeking to surcharge an executor or administrator, lodged when the accounts are filed.

The rules of 1845 (New South Wales) relating to the passing of accounts, are still in force in Queensland.

Executors and administrators should file and pass their accounts within fifteen months of the grant.

The court has no jurisdiction to order costs of litigious proceedings on an application to pass executors' accounts to be paid out of an estate, which is not in course of administration in the court, although the court may allow executors to retain out of the funds in their hands any expenses properly incurred by them in the execution of their office.

APPLICATION by certain beneficiaries under the will of Martin Macnamara, deceased, for an order directing the Registrar to inquire into objections filed on the passing of the executors' accounts, seeking to surcharge the executor for various sums alleged to have been received and not accounted for. The executor objected to the Registrar dealing with the matter, and on appeal to HARDING, J., the matter was referred to the Full Court.

Macgregor for the beneficiaries.

Feez for the executor.

The judgment of the court (Griffith, C.J., Harding and Real, J.J.) was delivered by

GRIFFITH, C.J.: The executor of the will of Martin Macnamara having filed accounts of his administration, the present applicants came in and lodged objections, seeking to surcharge the executor in respect of various sums of money, which they alleged he had received on account of the testator's estate, but had not accounted for. The executor disputed the Registrar's power to deal with the objections, and on appeal to Harding, J., the matter was referred to the Full Court. The point raised involves the whole question of the jurisdiction of the court with respect to passing executors' and administrators' accounts in a summary manner without action. The first origin of the Supreme Court of New South Wales was the Charter of Justice, issued on 13th October, 1823, under the authority of the Act 4, Geo. IV., c. 96, passed in the same year, which empowered his Majesty to erect and establish Courts of Judicature in New South Wales and Van Dieman's Land, to be styled the Supreme Court of New South Wales and the Supreme Court of Van Dieman's Land respectively (s. 1). Those courts were to have cognizance of "all pleas, civil, criminal, or mixed," and the same equitable jurisdiction as the Lord Chancellor, their jurisdiction in all such cases being defined in the Act (ss. 2, 11). With respect to what is called ecclesiastical jurisdiction, the Act provided (s. 10) that the courts should administer and execute such ecclesiastical jurisdiction as should be committed to them by the King's Charter or Letter's Patent. The charter of October, 1823, ordained (s. 14) that the Supreme Court of New South Wales should be a court of ecclesiastical jurisdiction, with power to grant probates and letters of administration, and to sequester the effects of persons dying and leaving effects within the colony in cases allowed by law—"as the same is and may now be used in the diocese of London," and "to demand, require, take, hear, examine, and allow, and if occasion requires to disallow and reject, the accounts of them in such manner and

form as are now used or may be used in the same diocese of London." The charter also directed (s. 17) that the court should fix certain periods when all persons to whom probates and letters of administration might be granted should, until the effects of the deceased persons were fully administered, "pass their accounts relating thereto before the court," and that the court should from time to time make such orders as might be just for the due administration of the assets, and might allow a commission or percentage to the executor or administrator out of the assets for his pains and trouble, but that no allowance should be made to any executor or administrator who should neglect to pass his accounts at such time . . . as in pursuance of any general or special rule or order of the court should be requisite. The authority of the court to pass the accounts of executors and administrators was thus clearly established. The Act 4 Geo. IV., c. 96, was repealed by the Act 9 Geo. IV., c. 83, which, however, provided (s. 2) that the Supreme Courts instituted by the charters of 13th October, 1823, should retain and exercise the several jurisdictions vested in them by the charters as fully and effectually as if they had been instituted in virtue of the Act itself. The same Act (s. 16) empowered the Judges of the Courts of New South Wales and Van Dieman's Land to make rules and orders "touching . . . the granting of probate of wills and letters of administration . . . and all matters and things whatsoever" as to his Majesty might seem meet for the conduct of business in the courts, or as might be adapted to the circumstances of the colonies, subject to disallowance by the Crown. This Act, which was in the first instance temporary only, was continued from time to time, and in 1842 was made perpetual (5 and 6 Vic., c. 76). In 1845 rules of court were made by the Judges of the Supreme Court of New South Wales prescribing the procedure on passing executors' and administrators' accounts. These rules, which may be found at p. 865 of Mr. Justice Harding's "Acts and Orders," require that an inventory shall be filed within six months after the grant of

probate or administration, and that within fifteen months from the same date the executor or administrator shall file in the Registrar's office "a full, true, and just account of his administration, which account shall be passed" before the court or a judge. Upon the filing of an account the Registrar is to give public notice in the *Gazette* that it has been filed, and that all persons having claims on the estate, or being otherwise interested in it, may come in before him at his office on or before a specified time and inspect the account and object to it. If at or before that time any "exception" is taken to the account, "the same shall be inquired into and disposed of, and such order or orders from time to time be made in the matter as the judge shall direct"; but if "no such objection" be made the account may be passed with such allowances and commission "as the judge auditing the same shall think reasonable." There can be no doubt that these rules were within the authority of the judges as declared by the Charter of Justice, and the Act 9 of Geo. IV., c. 83. The practice established by them of passing executors' and administrators' accounts in a summary way without suit continued until the time of the establishment of the colony of Queensland. The object of them was thus stated by Wise, J., in *re Thompson's will* (3rd July, 1860, cited in argument in *re Carvell* 3 (N.S.W.), S.C. Reports at p. 356). "Under s. 17 (*i.e.*, of the Charter of Justice) accounts are to be passed from time to time, and the balance to be paid as the court shall direct for safe custody, a power which, I believe, does not exist in the Ecclesiastical Court in England; orders are to be made for the administration of the assets, for payment to creditors and persons entitled as legatees, next of kin, or by any other right or title whatsoever, and wherever resident: showing as it appears to me that the court was intended to be, so to speak, the guardian and protector of the interests of all parties to whom any rights should accrue by the death of the deceased. It is most reasonable that such a duty should have been imposed on the court, where those interested would, by reason of

their absence, so often be unable to protect themselves." By the Statute 18 and 19 Vic., c. 54, under the authority of which Queensland was erected into a separate colony, her Majesty was empowered, in the event of the erection of a new colony, to make provision by Order-in-Council for the government of such new colony. By the Order-in-Council of 6th June, 1859, constituting the colony of Queensland, it was provided (S. 20) that all courts of civil and criminal jurisdiction within the colony should continue to subsist as if the order had not been made until other provisions should be made by the Colonial Legislature. Before separation a court called the Supreme Court of Moreton Bay had been established in what is now the colony of Queensland, having within its district all the jurisdiction of the Supreme Court of New South Wales. The effect of the Order-in-Council was, therefore, that the ecclesiastical jurisdiction of the lastnamed court was continued to the Supreme Court of Moreton Bay after separation. By the Act 25 Vic. No. 13, passed in 1861, the Supreme Court of Queensland was constituted by that name, with all the jurisdiction of the courts of Queen's Bench, Common Pleas, and Exchequer, and of the Lord Chancellor and Equity Judges in England. This Act also contained two sections (taken from the Victorian Act 15 Vic., No. 10, in which they stood as s.s. 15 and 16), dealing with the subject now under consideration. They are as follows:—"24. The said court shall have ecclesiastical jurisdiction within the said colony of Queensland and its dependencies, and shall have power and authority to grant probate under its seal of the last will of any person who shall die leaving personal effects within the said colony, and to commit letters of administration under its seal of all the personal effects whatsoever within the said colony of any person who shall have made a will without having named an executor thereof resident within the said colony, and where the executor being duly cited shall not appear and sue for the probate thereof, with reservation nevertheless in any of the two last-mentioned cases to revoke such letters of admini-

stration and to grant probate of the said will to the executor therein named when he shall duly appear and sue for such probate, and such letters of administration shall be committed by the said court to any person, whether of kin to or a creditor of the person so dying as aforesaid or not, as to the said court shall seem meet, and in every case in which letters of administration are granted by the said court it shall have power and authority to sequester all the personal effects whatsoever within the said colony of the person so dying as aforesaid in cases allowed by law, as the same is and may now be used in the province of Canterbury, and the said court shall have power and authority to require, hear, examine, and allow, and if necessary to disallow and reject, the accounts of the persons to whom probates may be granted and letters of administration committed in such manner and form, and as fully and amply to all intents and purposes whatsoever, as may now be done in the province aforesaid, subject nevertheless to such orders and directions as may be made by the said court, either generally as applicable to all cases, or specially with reference to any case in particular, or to such rules of court as may be made as hereinafter provided. 25. It shall be lawful for the said court to make all such orders as may be necessary for the due administration of the assets of any such estate to all persons entitled thereunto, and also for the payment out of such assets to the persons administering the same of any costs, charges, and expenses which may have been lawfully incurred by them, and also such commission or percentage as shall be just and reasonable for their pains and trouble therein, and if any such executor or administrator neglect to pass his accounts or to pay deposits or to dispose of the goods, chattels, and credits belonging to the estate of any deceased person at the time and in the manner directed, it shall be lawful for the court on the application of any person aggrieved by such neglect to order and direct that such executor or administrator shall pay interest at a rate not exceeding eight pounds per centum per annum for such sums of money as

from time to time shall have been in his hands, and the costs occasioned by the application." The same Act also provided (s. 67) that all the rules and orders "for regulating the process, pleading, and practice, and other matters therein-before enumerated" then in force should continue in force in the Supreme Court of Queensland until repealed by New Rules, except so far as they were inconsistent with the provisions of the Act. It is to be noticed that the reference in the Act of 1861 is to the practice in the Prerogative Court of Canterbury, instead of to the practice of the diocese of London. The rules of 1845, however, continued in force and governed the exercise of the powers conferred by sections 24 and 25 so far as they were applicable. In *The Supreme Court Act of 1867* (which was one of a series of Consolidating Acts), s. 24 of the Act of 1861 was not re-enacted, but there was substituted for it (in accordance with the general scheme of the Act, so far as regards the definition of the several jurisdictions of the court) s. 23, which is adopted from s. 23 of the English Court of Probate Act (20 and 21 Vic. c. 77), and is as follows:—"The Supreme Court shall have the same powers, and its grants and orders shall have the same effect, throughout all Queensland, and in relation to personal effects in all parts of Queensland, as the Prerogative Court of the Archbishop of Canterbury and its grants and orders respectively had aforesaid in the province of Canterbury, or in the parts of such province within its jurisdiction, and in relation to those matters and causes testamentary and those effects of deceased persons which were within the jurisdiction of the said prerogative court, and all duties which by statute or otherwise were imposed on or should be performed by ordinaries generally, or on or by the said prerogative court in respect of probates, administrations, or matters or causes testamentary within their respective jurisdictions shall be performed by the Supreme Court, and the said court shall have full and entire ecclesiastical jurisdiction throughout Queensland and its dependencies. Provided that no suits for legacies or suits for the distribution of residues shall be

entertained save by the Supreme Court in equity." Section 25, which was subsidiary to s. 24, was re-enacted, and now stands as s. 6 of the Probate Act of 1867. It will be observed that, instead of the enumeration of the powers of the court in its ecclesiastical jurisdiction, including the passing of the accounts of the executors and administrators, which had been contained in the Charter of Justice, and in s. 23 of the Act of 1861, there was substituted a declaration that the court should have all the powers of the Prerogative Court of Canterbury. The existing practice of the court was, however, continued (s. 52) until repealed, except so far as it was inconsistent with or repealed by the Act. It becomes necessary, therefore, to consider whether the Prerogative Court of Canterbury had, when its jurisdiction was transferred to the Court of Probate in 1857, any powers to the exercise of which the rules of 1845 are applicable. The circumstance that the practice adopted by the Prerogative Court in the exercise of that jurisdiction may have been different from that adopted by the Supreme Court, is not, in our opinion, material. There is no doubt that in ancient times the Prerogative Court, which was a spiritual court, exercised a jurisdiction over executors and administrators by requiring them to bring in inventories, and to pass—that is, to vouch—their accounts—Story's Equity Jur., s. 537; William's Executors (9th edition), 847-8, 1950; *Telford v. Morison* 2 Add. 319, (1824). We are not aware of any reason for supposing that this jurisdiction was ever taken away, although of later years it was seldom exercised, the more complete remedy available in an administration suit in Chancery being preferred. The proviso in s. 23 of the Probate Court Act (s. 23 of *The Supreme Court Act of 1867*) seems indeed to indicate that the power to require the passing of accounts as distinguished from a power to distribute the assets, was intended to be preserved. But even if the exercise of the jurisdiction had entirely fallen into disuse in the Prerogative Court, that circumstance could not, we think, operate to deprive this court of the same jurisdiction, which it has always

had and constantly exercised, although the jurisdiction had previously been conferred by different words. It only remains to consider the extent of the jurisdiction of the Prerogative Court as to dealing with objections to executors' and administrators' accounts. Titles 234 to 237 of Oughton's *Ordo Judiciorum* are devoted to the consideration of this subject. It is there laid down that it is competent to object that goods are omitted from the inventory, and the mode by which the accounting party is to discharge himself is fully discussed. The case of *Telford v. Morison* is to the same effect. Sec. 6 of *The Probate Act of 1867*, already referred to, expressly recognises the authority of the court to "pass" executors' and administrators' accounts. And, apart from express authority as to the ancient jurisdiction of the Prerogative Court, the term "passing accounts" seems to us necessarily to involve an inquiry into their accuracy. Otherwise the proceeding, which is a solemn one undertaken by a court of justice, would be absolutely futile. We think, therefore, that the court has authority on passing executors' or administrators' accounts to examine them and inquire whether they are accurate or erroneous. The rules of 1845 appear to us to be apt for regulating the exercise of this jurisdiction, which is merely a continuation of the similar jurisdiction previously conferred on the court by other words. We are of opinion that they are still in force, except so far (if at all) as they may be inconsistent with the proviso to section 23 of the Act of 1867. They recognise the right of all persons who have claims on the estate or are otherwise interested in it to "object" to the account, and they require the "exception," if any, to be inquired into and disposed of. We can see no reason for limiting the words "objection" and "exception" to one side of the account. An account becomes incorrect just as much by erroneous omissions as by erroneous inclusions. We are therefore of opinion that the Registrar had authority in the present case to inquire into and dispose of the objections lodged by the present applicants. We think it desirable

to add some general observations on one or two points that were discussed during the argument. In a vast majority of cases the only information which the parties have as to the estate is afforded by the accounts themselves. Experience shows that in very few do they think it necessary or desirable to lodge objections. It may happen in a rare case that an objection may be of such a nature that the registrar or the judge (before whom the account is theoretically taken) is unable to dispose of it in a summary manner. In such a case the judge can, if necessary, direct an issue to be tried or an action to be brought. In such a case it would generally be not worth while to proceed further with the passing of the accounts. As the accounts are in theory passed by the judge, a party dissatisfied with the Registrar's opinion on any point should require the matter to be referred to the judge before the report or certificate is signed. We do not think it necessary to express an opinion as to the effect of the order of the court passing the accounts. It may be observed, however, that whether the accounts are, as a matter of law, thereafter to be treated *prima facie* as settled accounts or not, they would practically be regarded by all parties in that light, and further, that knowledge by executors and administrators of their obligation to file and pass accounts of their administration within fifteen months of the grant affords (as pointed out by Sir John Nicholl, in *Telford v. Morison*) a real and substantial advantage to the persons beneficially interested in the assets. In the case of accounts which are incorrect by reason of an omission of assets, it may be that the Court cannot direct the inventory to be amended by the inclusion of the omitted item. (See the same judgment). But in such a case the Court will decline to pass the accounts, and the executor or administrator will be liable to the penalty imposed by section 6 of the Probate Act, and to proceedings to compel him to file proper accounts. An administrator will be further liable to have the bond put in suit against him. The order on the present application will be that the Registrar inquire into and dispose of the

objection. With respect to the question of costs, we do not think that in proceedings to pass executors' accounts the Court has any authority to order that the costs of litigation be paid out of the estate, which is not in course of administration in Court, although the Court may allow executors to retain out of funds in their hands any expenses properly incurred by them in the execution of their office. And under all the circumstances of this case, which is of first impression and some difficulty, we do not think that it would be just to order the executor to pay costs personally. There will, therefore, be no order as to costs. The question of the right of the executor to indemnity out of the estate depends on other considerations, and is not affected by this order.

Solicitor for beneficiaries: *P. A. O'Sullivan.*

Solicitors for executor: *Forston & Cardew.*

BUNDABERG CRIMINAL SITTINGS.

HARDING, J.

17th April, 1895.

REGINA v. MANY MANY AND OTHERS.

Criminal law—Evidence—Confession—Answers to questions put by a police constable after arrest—58 Vic., No. 23, ss. 2, 10.

A confession elicited by questions put to a prisoner by a police constable after arrest and without caution is admissible against the prisoner unless the answers have been induced by a threat or promise.

Regina v. Gavin (15 Cox, 656) and *Regina v. Male* (17 Cox, 689) not followed.

INFORMATION against Many Many, Forka, Nara-samei, Miore, Ohasbiby, and Quitongtonga, Pacific Islanders, for the murder of a white man, whose name was unknown.

Evidence was given of the finding of the body of a man, and several articles were found near the body and taken possession of by the police. The Crown proposed to give in evidence, statements made by each prisoner to a police constable after arrest and without caution being administered. The constable pointed out the articles to the prisoners separately and said, "You see them?" The prisoners answered, "Yes; belong 'em old

fellow white man ; me altogether kill 'im."

Scott, for the prisoners, objected, and submitted the police had no right to ask questions after arrest, citing *Regina v. Boulton*, 9 Cox, 408 ; *Regina v. Garin*, 15 Cox, 656 ; *Regina v. Male and Cooper*, 17 Cox, 689 ; *Regina v. Walker*, 18 V.L.R., 469 ; and submitted the question was not affected by 58 Vic., No. 23, s. 10.

Power, for the Crown, submitted there was no inducement, and pressed for the ruling of the court.

HARDING, J.: *The Evidence and Discovery Act of 1867* was meant to be a code on the law of evidence for Queensland. Sec. 64 of that Act dealt with confessions, and is identical with sec. 11 of the New South Wales statute, 22 Vic., No. 7. Sec. 64 was repealed last year by *The Criminal Law Amendment Act*, and a new provision enacted, which now regulates the law under sec. 10. This provision is that no confession shall be received which has been made under the influence of a threat or promise made by a person in authority. That re-enacts the old law, with this exception: that it leaves out the provision of the Act of 1867, which regulates a confession induced by an untrue representation, or a confession induced by a threat or promise made by any person whatsoever. Now the law provides that the threat or promise inducing the confession must be made by a person in authority. When this law came into force in New South Wales the law in England was different from that cited by the learned counsel for the defence. In *Roscoe's Criminal Evidence*, 10th edit., p. 51, it is stated that a confession is admissible in evidence where it has been elicited by questions put by a person in authority. The law of England before 1867 is to be found in the case of *Regina v. Thornton*, 1 Mood, C.C. 27 ; also in *Russell on Crimes*, vol. iii., p. 472 ; and the cases collected in *Archbold*, 264-266, all contained the same ruling, till *Regina v. Garin*, which was decided after the passing of the colonial Act. In England, where there is no statutory law on the subject, it appears to me that the judges have been expanding the rule against

the admission of confessions. The New South Wales statute was passed in 1858, before Separation. So far as I know, it has been the constant practice here to allow such answers to go in. I have frequently had occasion to comment on the impropriety of obtaining evidence in such a way, but I am certain the above has been my practice, and I have a strong recollection of Sir Charles Lilley also having made it so. His charge to a constable in one case was, "Keep your eyes open, and say nothing." But he held that if a constable did ask any questions of a prisoner when under arrest, although it was morally wrong, the evidence was not inadmissible. It has been decided at least six times in New South Wales that such evidence is admissible. These cases are cited in *Wilkinson's Magistrate*, pp. 118-119. In the case of *Regina v. Spring and Mason*, where the accused were charged with murdering one De Witt, the learned judge would have admitted the confession, had not the statement that induced it been untrue. That was as far back as 1860. I think, therefore, that as regards the law in the colonies, the matter is *res judicata*. If it is not, I am perfectly willing to assume the responsibility of deciding it myself. I admit the evidence.

The prisoners were convicted, and sentenced to death.

Solicitor: *Thorburn*.

APRIL SITTINGS OF THE FULL COURT.

Re the will of SILAS HARDING, DECEASED.

Probate Act of 1867 (31 Vic., No. 9), s. 32—Renunciation of Executor abroad—Ancillary Letters of Probate.

When probate of the will of a testator who has personal property in Queensland, has been granted by the proper court of the country of his domicile to the executors, ancillary probate will, in the absence of special circumstances, be granted to the same persons, although they are out of the jurisdiction.

If special circumstances exist, rendering it undesirable to grant ancillary probate, the court may, under sec. 32 of *The Probate Act*, make a special grant of administration.

A grant of ancillary letters of probate was made to two of three executors, who had all proved in Victoria, leave being reserved to the third, who had attempted to renounce, as to Queensland, to come in and apply for a grant.

APPLICATION for a grant of ancillary probate to E. M. Harding and James Grice, the executrix and one of the executors of Silas Harding, who died in Victoria on 18th June, 1894, never having been domiciled in Queensland. The testator appointed the applicants and William McLean the executrix and executors of his will. They all resided in Victoria, where probate was granted. The deceased left property in Queensland valued at £131,000. McLean renounced his right to probate in Queensland, and there were no legatees or beneficiaries there. The creditors in Queensland consented to the grant without security.

The Registrar raised the points (1) whether McLean could renounce in Queensland; and (2) whether the form of renunciation was sufficient. The matter was referred to Griffith, C.J., who doubted whether he could inquire into the question of the consent of the creditors, and also whether, in view of the cases cited hereunder, it was a case for granting ancillary letters of probate.

The question was referred to the Full Court, consisting of Griffith, C.J., Harding and Real, JJ.

Lilley, in support of the application, cited Tristram and Coote's Probate, 11th edition, pp. 225, 238, Williams' Executors, 227, 331, 332; *re the will of Levy*, 6 A.L.T., 117; *re Hope*, 1 Q.L.J., 11; *re Paterson*, *ib.*, 103; *re Mackenzie*, *ib.*, 124; *re Renny*, 2 Q.L.J., 72; *Enohin v. Wylie*, 10 H.L.C., 1.

The judgment of the court was delivered by

GRIFFITH, C.J.: The testator was domiciled in Victoria, and died there, appointing an executrix and two executors living in Victoria. By the law as laid down by Lord Westbury in *Enohin v. Wylie* (10 H.L.C., 13), "The administration of personal estate of a deceased person belongs to the court of the country where the deceased was domiciled at his death." It was the function of the Supreme Court of Victoria to administer the estate of the testator, including the estate in Queensland, when

it got possession of it. This Court will, of course, lend its aid to the proper proceedings which may be necessary for that purpose. It is also, I think, a recognised rule, as was also laid down by the same learned judge in that case, that when the court of a domicile has decided who are the executors, and granted probate to them, it is the duty of the court to clothe them with ancillary letters of probate here to enable them to get possession of the personal estate, which in fact, though not in law, is locally situate in Queensland. *Prima facie*, therefore, I think that the executrix and executors, on obtaining probate in Victoria, are entitled to obtain ancillary letters of probate in Queensland; but the *Probate Act* recognises that there may be circumstances in which the court may refuse to grant probate to executors who are out of the colony. That, I think, applies as well to executors who are applying for what is called the leading grant of probate, as to executors who are applying for ancillary letters of probate. Under sec. 32 of that Act we may, I think, make a special grant of administration in such a case. The question then is, are there in this case any special circumstances, the executors being out of the jurisdiction of the colony, which would lead the court to think it necessary or convenient to appoint someone else? I do not think there are. The only circumstance that can be suggested is that there are some debts in Queensland. The creditors to whom these debts are owing are said to consent. I confess that I feel some difficulty as to how far the court can rely on a mere statement by executors that there are no debts, or that they do not know of any debts; but I think that in this case, from all that is known of the estate, there are no special circumstances disclosed such as would induce the court to refuse to grant ancillary probate. Another point arose in the case. There are three persons named in the will to whom probate was granted in Victoria. Two only now apply for ancillary probate, the third having renounced so far as regards the estate in Queensland. There may be some doubt as to the exact effect of that renunciation, either in this

colony or so far as regards the subsequent and final administration of the estate by the Supreme Court of Victoria, the colony of domicile, but I do not think the third executor, who has not joined, can prevent the other two from making application to this court. It is quite clear that administration must be granted to somebody. I think, therefore, that the proper order will be to grant ancillary probate to the two parties applying, reserving leave to the third to come in to apply for a grant if he thinks proper to do so.

Solicitors: *Macdonald-Paterson & Hawthorn.*

MAY SITTINGS OF THE FULL COURT.

IN RE DWYER.

Practice—Costs—Solicitor and Client—Taxation.

The costs of a country solicitor attending in town are an unusual expense to be allowed between party and party. In order that the solicitor may recover such costs as between solicitor and client, he must have warned his client that such expense might not be allowed on taxation between party and party, and that the client might have to pay them himself.

Re Blythe and Fanshawe, 10 Q.B.D., 207, followed.

APPEAL by Joseph Dwyer, solicitor, from an order of Cooper, J., refusing to order the taxing officer to review the taxation of his bill of costs, which had been taxed by him as between solicitor and client in an action by his client Garde against Rosenberg and White.

Fees for appellant. *Lilley* for respondent, Garde.

The facts are set out in the judgments.

GRIFFITH, C.J.: In the two cases that have been mentioned—*re Blythe & Fanshawe* (10 Q.B.D., p. 207)—and in *re Broad & Broad* (15 Q.B.D., 420), the rule is laid down in these words by Lord Justice Baggallay in the first place, and adopted in its terms by the Court of Appeal:—"I take it to be the general rule of law, and an important rule which is to be observed in almost all cases, that if an unusual expense is about to be incurred in

the course of an action, it is the duty of the solicitor to inform his client fully of it, and not to be satisfied simply by taking his authority to incur the additional expense, but to point out to him that such expense will, or may not, be allowed on taxation between party and party, whatever may be the result of the trial." In the present case Mr. Dwyer, a solicitor practising at Charters Towers, had a client named Garde, who brought an action, which came on for trial at Townsville. Mr. Dwyer attended the trial as solicitor for Garde. The question arises with respect to his professional costs of attendance at Townsville in that capacity whether it is a usual charge or not. If the costs of a country solicitor attending trial in town are a usual charge to be allowed between party and party, the rule laid down in *re Blythe & Fanshawe* would not apply; but if such costs are an unusual expense within the meaning of that rule, then the rule does apply. The question is, do the costs of a country solicitor attending in town constitute a usual expense? On that the authorities cited show that generally those costs are not allowed, and some special circumstances must be shown before such costs are allowed. They may be allowed, but only when special circumstances are shown to exist. That is the rule in England, and I think it is also the rule here. So far from disputing that that is the rule, Dwyer appeals to it as a reason for saying that he must have told his client that. He said to the Registrar that from his experience as a solicitor the existence of this rule must have been present in his mind, and knowing that he must have told his client. So at any rate, so far as he was concerned, he believed they were not usual expenses to be allowed between party and party. I do not think they were either. If that is so, in order to protect his client Mr. Dwyer must have warned him that if he instructed his solicitor to incur these expenses he might not get them from the other side. It was said by Lord Esher, in *Broad & Broad*, that he ought to tell his client that the expenses would probably not be allowed as between party and party, and therefore whether

he won or lost he might have to pay the expenses himself. He (Lord Esher) was by no means sure that if the client were told this he would say, "Never mind. I will pay it." The reason for the rule is this, that a solicitor is expected to know the law, whilst the client can hardly be expected to know of the rule on that point; and it is only reasonable when a contract is entered into between them that each party shall be on an equal footing of knowledge of the law which governs the interpretation of the contract. I am of opinion that these were not usual costs. I think the solicitor is not entitled to recover them from his client—they were not allowed on taxation between party and party—if he did not give his client the warning. The Registrar has found that he did not. Under these circumstances the appeal fails, and must be dismissed, with costs. I think it is very important that country solicitors should know this, if they do not know it. I believe a great many of both country and town solicitors do not know it.

HARDING, J., concurred.

REAL, J.: I fully agree in the judgment that has been given, and with the remarks of Lord Esher. A more wholesome rule than that laid down I never heard of. It seems to me it is laying down a principle applicable to a particular class of contracts, not to contracts generally. The principle is that stated by the Chief Justice, that in these particular instances one contracting party is dependent on the other. He is relying on that other, and if he is dealing with that other under the assumption that if he is put to costs he may recover it, it is incumbent on that other to tell his client that he may possibly be at a loss. At the same time I don't quite agree with the principle that "not usual" is not usual between party and party. I think it means not usual between solicitor and client. Cases might occur where costs are not usually allowed between party and party, but where costs are usually allowed between solicitor and client: and that would not, in my opinion, come a matter unusual within the meaning of *se of Blythe & Fausshure*. In the present

case, whether or not it has grown up in our court as a matter of practice to allow these attendances of a country solicitor, or whether, as appears to be the opinion of the Chief Justice, it has been the practice of the Taxing Officer not to inquire into the propriety of the attendances, but merely the remuneration which ought to be allowed, are matters for inquiry. In the one case, I think it would be necessary to inquire whether such a practice has grown up. Such a practice does not exist in England, and *prima facie* we might take it that it does not exist here. The statement made shows that Mr. Dwyer knew the practice, though he is not prepared to swear that he told Garde that it was not liable to be recovered, but knowing the law himself, he thinks he told him. I think the rule should be adopted, and I see no reason why this court should not be as well able to establish a rule as the English court. In the case of *Blythe & Fausshure*, they simply do it on the general principle that a person who is dealing with another reposes confidence in him—just the same principle that a trustee dealing with his *cestui qui trust* must show that his client is fully cognisant of the circumstances affecting his liability, before he can make a profit of an unusual charge. Lord Esher simply says "The rule was laid down by this court, and it does not require any authority to support it." I see no reason why this court should not say the rule is laid down by this court and requires no authority to support it.

GRIFFITH, C.J.: I quite agree with the rule, but I do not think the word "unusual" means unusual between party and party.

Appeal dismissed with costs.

Solicitors for appellant: *Schacht and Cohen*.

Solicitors for respondent: *Bernays and Osborne*.

In the matter of The Insanity Act of 1884 AND in the matter of J. R. NEWMAN-WILSON, A PERSON OF UNSOUND MIND.

Insolvency—Presentation of petition by committee of insane person.

The court has power to sanction the presentation of a petition in insolvency or for the liquidation of the affairs of an insane person by his committee.

APPLICATION by the committee of J. R. Newman-Wilson, a person of unsound mind, for leave to present a petition for the liquidation of the affairs of the said J. R. Newman-Wilson, referred to the Full Court by Griffith, C.J.

Rutledge, in support of the application, cited *re Cahen* (10 Ch.D., 183), *re Lee* (23 Ch.D., 216), *re James* (12 Q.B.D., 332).

GRIFFITH, C.J.: This application really raises the question whether a person who has been declared a lunatic, and is therefore under the supervision of the court in its Lunacy Jurisdiction, can take advantage of the provisions of the Insolvency Act. The old law clearly was that a lunatic could not commit an act of bankruptcy, and could not by any act of his own bring himself under the provisions of the bankruptcy law, while he was insane. That law appears never to have been explicitly altered. It may be remarked, however, that at that time proceedings in bankruptcy were always hostile proceedings by the creditor against the bankrupt. Lunatics who were creditors were allowed to take advantage of the bankruptcy proceedings, which were considered civil actions for that purpose, and bankrupts who afterwards became lunatics were allowed to take proceedings in the bankruptcy to get their discharge. That being the old law, and it not having been altered in this colony by any statute, I was asked to give leave to the committee of this estate to present a petition for liquidation of the lunatic's estate. I asked for authority to show that the court had power to do so, and reference was made to several cases, of which three only have been referred to here. The first is that of *ex parte Cahen* (10 Ch. Div., 183). in which Lord Justice James, exercising jurisdiction in lunacy,

pointed out that a lunatic could not either by himself or a next friend commit a voluntary act of bankruptcy, but said that possibly if he had been found a lunatic by inquisition the Court of Lunacy might think it would be for his interest to do so, and might be able to act on his behalf—that is, as I understand it, might allow his his committee to commit an act of bankruptcy for him. That was in 1879. In *re Lee*, in 1883, under the same law, leave was given to the committee to consent to an adjudication in bankruptcy against a lunatic. That is the first instance that I know of in which the committee of a lunatic was allowed to do anything which would have the effect of bringing his estate within the jurisdiction of the Court of Bankruptcy. Then in 1884 came the case of *re James* (12 Q.B.D., 332), in which an application was made by the committee of a lunatic for leave to file a declaration in the name of a lunatic of inability to pay debts, or to petition in his name against himself. That case came before a court consisting of Lord Selborne, Lord Coleridge, and Lord Justice Cotton. Lord Selborne is reported to have said that it appeared to be for the benefit of the lunatic that he should be made a bankrupt, and he was therefore of opinion that the court ought to make the order asked for. The other members of the court concurred, and the leave was given. The cases I have mentioned were referred to, as was also s. 148 of *The Bankruptcy Act, 1883*. That section expressly provides: "For all or any of the purposes of this Act a corporation may act by any of its officers authorised in that behalf under the seal of the corporation, a firm may act by any of its members, and a lunatic may act by his committee or curator bonis." It is hardly possible, however, to suppose that the court based its decision on that section, which apparently means that a lunatic may do, through his committee, such things as a corporation may do by its manager. Such a provision would have no application to a case of this sort. The only inference I can draw is that the court intended to adopt the suggestion thrown out by Lord Justice James in *ex parte Cahen*. I

think, therefore, that we ought to treat *re James* as a decision that the court has power to give leave to the committee of a lunatic to present a petition in insolvency or for liquidation. But I think that the matter should be referred back to the Judge of first instance to consider the propriety of granting leave to the committee to present a petition for the liquidation of the lunatic's affairs.

HARDING, J.: From the first I have felt myself considerably embarrassed by the question that has been raised here for decision—whether or no an insane person's estate can be rendered subject to the Insolvency Laws, on the initiatory of his committee. I am embarrassed by that, because the question was only argued by the person who desires to sustain that jurisdiction in the court. If this case is decided *ex parte*, persons may arise who may have interests in disputing that question, and who would be entitled to litigate that question with the persons who now support the jurisdiction. Consequently, the court on a subsequent occasion will be embarrassed by a direct decision upon the existence or non-existence of the actual jurisdiction. I consider that it is unnecessary to hold that the estate of an insane person is subject to the Insolvency Laws for the purposes of the decision in this case, and I decline to take part in any decision of the kind. If it would be for the benefit of the estate that it should be placed under the Insolvency Laws, I think the court would give its sanction to the initiation of the proceedings to bring the estate under the Insolvency Laws, in the course of which proceedings the question of jurisdiction would be decided, and would be decided not in the absence of the parties having an interest to sustain the opposite view. I think it would be for the benefit of the estate that it should be placed in insolvency, and I think the court will give its sanction to the initiation of the proceedings to bring it in insolvency, without at all deciding what will be the result of those proceedings.

REAL, J.: The question for decision in this case is whether the court has jurisdiction to authorise the committee of the lunatic to consent

to or be a party to insolvency proceedings on behalf of the lunatic. That question is in substance whether the court can by its authority give a status to a lunatic to commit a voluntary act of bankruptcy by or through his committee. Until very recently the law appeared to be clear that a lunatic could not commit an act of bankruptcy, and by no process could he be supposed to do it. The cases show, however, that the lunacy of a man does not prevent or deprive other persons of their rights, which can be enforced against the property of a lunatic. Consequently, upon that principle, the creditors of a lunatic could always petition against a lunatic. The court in that case could also authorise the committee to protect the interests of the lunatic, and appear on such petition to prevent it being made, if the circumstances were not such that the law authorised the creditor to obtain that particular relief. Again, the cases show that when a person having been made insolvent, becomes a lunatic after the insolvency, the property having been disposed of in the manner provided by the Insolvency Act, he can, if his conduct and dealings have been such that his certificate ought to be granted, obtain it after mere formalities, such as the making of an affidavit, have been complied with. In one case it was held that the committee might make the affidavit, or, if the court thought proper, the certificate might be granted without the affidavit; but the court held in all these cases that the committee could apply for such relief on behalf of the insolvent as the facts showed him to be entitled to if he were competent to make an application. That seems to me to be the great distinction between an application to make the lunatic insolvent, and an application to obtain his discharge. In one case it was held that unless an act of bankruptcy had been committed by him neither the creditors nor anyone else could make him insolvent. That, until recent years, was believed to be the law. The courts have always held that the mere fact of lunacy neither prevented others obtaining their relief against him, nor did it prevent him obtaining relief against others—

that was in cases in which committees were entitled to enforce their rights against debtors. We are now asked to decide or authorise a committee to commit an act of insolvency on his behalf. I would not have said more than that I agree with my brother judges, had it not been for the fact that my brother judges do not appear to fully agree upon what the effect of our decision would be. Mr. Justice Harding seems to think that by our giving leave to file a petition we do not, so to speak, find that we have authority to permit a committee to commit an act of insolvency on behalf of the lunatic. If we have not that authority, then I think that our decision should be that the court has not power to permit a petition to be filed against a lunatic, or to authorise a committee to commit an act of insolvency on behalf of a lunatic, because the committal of that act would amount to insolvency. It therefore becomes incumbent to consider whether we have that power. Now, in my view of the law, ascertained from the decisions antecedent to the decision in *James'* case, it is clear that the court has no such power—that no act which depends on the will of the insolvent can be performed when the insolvent is a lunatic. Lunacy does not deprive a person who has the right of relief against the lunatic of that right, and it does not deprive the lunatic of the relief which can be enforced by him against others, but lunacy would deprive the lunatic of the power of rendering himself liable to some law which is inoperative unless by an act done by his own will. The view of the law which I would be led to form by the cases antecedent to *ex parte James* is inconsistent with the statement of Lord Justice James, that it was possible that in a case in which a lunatic was so found by inquisition, the court in its jurisdiction over lunatics might take that course followed by the case in which Jessel and the other judges decided—that is, the case of *Lee* (23 Ch. Div.)—that a committee could consent to an adjudication. The only ground on which a committee could consent to an adjudication was that he could be a party to the lunatic's committing an

act of insolvency. The act of insolvency which must be the foundation of the petition or adjudication in any bankruptcy can only be assented to by the committee as having been committed since the declaration of the lunacy. The case of *re James*, in 1884, was a clear authority that the court could authorise a committee to commit an act of insolvency on behalf of the lunatic by consenting to an adjudication. In that case the court distinctly decided the very point being raised here—that he could file a liquidation petition. These decisions are precisely in point, and following them I think we must come to the conclusion that the earlier cases were decided under a misconception of the law, and that the court has power to authorise the committee of a lunatic to file a liquidation petition against the lunatic. The difficulty which presses on my brother Harding presses equally on me, but it only presses to this extent, that it might furnish a reason why the law would be more reasonable if it did not allow the court to give such relief. It also furnishes a reason—but we are not considering that—why, unless a very strong case is made, such relief should not be given, but I feel in deciding this question that the court has power to give the committee leave to file a petition. It necessarily follows that when that leave is granted it should not be futile. There is this, however, to be remembered: the Court of Appeal does not in an *ex parte* matter bind itself to its decision in the same way as if the matter has been argued both for and against. To that extent I feel that the decision should be limited.

GRIFFITH, C.J.: I desire to add, if I did not make myself sufficiently clear in the point that I entirely agree with my brother Real that our decision necessarily involves the result that when the court gives leave to the committee to present a petition, the leave so given is effective. The order will be that the matter be referred to the judge of first instance, with the intimation of our opinion that the court has power to sanction the presentation of the petition.

Solicitors: *Forston & Cardew.*

MAY SITTINGS OF FULL COURT, TOWNSVILLE.

LEE GOW V. WILLIAMS, *Ex parte* WILLIAMS.

Goldfields Act 1874 (38 Vic., No. 11), ss. 32, 67—
Jurisdiction—Small Debts Court—Sale of residence area.

A Small Debts Court has jurisdiction to hear a complaint for the balance of money due on the sale of a residence area on a goldfield.

S. 32 of *The Goldfields Act, 1874*, does not confer exclusive jurisdiction on a Warden's Court in such a case.

MOTION to make absolute an order *nisi*, granted by Cooper, J., on application of the defendant to quash a judgment of the Small Debts Court at Ravenswood, in favour of the plaintiff.

The action was for £17, balance of £26 purchase money due on sale of a house, ground, and appurtenances, the ground in question being a residence area on the Ravenswood goldfield. At the hearing the defendant admitted the debt, and the court gave judgment for the plaintiff.

The rule was granted on the ground that a Small Debts Court has no jurisdiction to hear and determine a claim for money due in respect of a residence area on a goldfield.

Beaumont, for the defendant, moved the rule absolute, and contended that the action should have been brought in the Warden's Court at Ravenswood, which court had exclusive jurisdiction in such matters. (*The Goldfields Act, 1874, s. 32.*)

CHUBB, J., referred to s. 82, conferring on District Courts, holding sittings on goldfields, the jurisdiction of the Warden's Court.

Macnaughton, for the plaintiff, showed cause—The Small Debts Court has a concurrent jurisdiction where the claim is a mere debt. The proviso to s. 32, when carefully examined, does not oust the jurisdiction of the Small Debts Court. (*Small Debts Act of 1867, s. 2.*) Subject to the exceptions in the section they have "power and authority to hear and determine in a summary way all actions whatsoever for the recovery of any debt, demand, or damage," &c. By s. 9 of *The Goldfields Act, 1874*, a residence area is personalty; it is declared to be a "chattel interest."

COOPER, J.: Plaintiff in this case sues defendant for balance of purchase money on sale of a residence area. It is contended that the Petty Debts Court has no jurisdiction to entertain such a complaint, because of the wording of s. 32 of *The Goldfields Act of 1874*. The wording of this section at first sight seems to indicate that no such claim as that which arises here, or is connected in any way with a residence area, could be entertained except in a Warden's Court; but a little further consideration of the whole section shows that this view is not correct. I think that any person who wishes to recover "any debt, demand, or damage, whether liquidated or unliquidated, to any amount not exceeding £30," may do so in the Petty Debts Court, whether a Warden's Court happens to be established in that district or not. I think that the rule should be discharged, with costs.

CHUBB, J.: In my opinion the Small Debts Court has jurisdiction in claims like these. The debt was admitted, and the warden has no peculiar jurisdiction to exercise to give effect to the judgment. By s. 67, a residence area (being land held under a business license) can be taken and sold under any execution from "The Supreme Court, District Court, Small Debts Court, or any other competent court," and the proper officer appointed to sell the same has "full power to give an effectual transfer of the interest sold by him." S. 32 merely regulates the procedure on suits instituted in Wardens Courts in regard to the place where the hearing is to be had. It does not confer the exclusive jurisdiction contended for.

Rule discharged, with costs.

Solicitors for the plaintiff: *Roberts & Leu.*

Solicitors for the defendant: *Daly & Beaumont.*

HALL V. LEYSHON, WALKER, AND ROGERS, *Ex parte*

E. HALL, BY HIS NEXT FRIEND, S. H. HALL.

Part ownership—19 Vic., 24 s., No. 10—Unlawful detinue of Goods—Notice of Claim.

An order will not be made under 19 Vic., No. 24, s. 10, against a person for wrongfully detaining goods in which he is a part owner, and there is no evidence

of his having parted with his interest to the persons complaining.

Notice of the claim may be given on behalf of the claimant.

MOTION to make absolute an order *nisi* granted by Chubb, J., on the application of the defendant to quash an order made by the Court of Petty Sessions, Charters Towers, against the defendant.

A number of persons at Charters Towers voluntarily formed themselves into an unregistered musical society called "The Apollo Orchestra." It was stated at the bar that they had rules; these were not before the court. From fees paid to the orchestra for playing at entertainments, instruments to the value of £100 were acquired by purchase. The defendant was a member of the orchestra. One of the instruments was a piccolo. It had been first borrowed from one Perkins by the defendant, and while in the latter's possession it was purchased by the orchestra from Perkins for £15. The defendant always had possession and charge of it, and played it in the orchestra; and he had possession of it at the time of these proceedings. The defendant discontinued attending the orchestra meetings after the annual meeting in September, 1894. On 10th January, 1895, a deed vesting the property in the instruments in the respondents as trustees for the orchestra was executed by 10 out of the 14 members of the orchestra; the remaining four, among them the defendant, did not execute it. The deed recited that the 14 persons (including the defendant) mentioned therein had been for some time past members of the orchestra, and as such had acquired an interest in the musical instruments and other property of the orchestra. On the 9th March following, the solicitors for the respondents demanded from the defendant the delivery of the piccolo, and subsequently on the same day gave him notice of the demand. Proceedings were then taken under 19 Vic., No. 24, s. 10, and at the hearing the justices ordered the piccolo to be returned to the respondents forthwith.

The rule was granted on the following grounds:—

1. Notice of the claim was not made by the person complaining.

2. No evidence of property in or possession of the piccolo by the respondents as against the appellant.

3. No jurisdiction to make the order, as the evidence shewed a co-ownership between the appellant and the other members of the orchestra.

Macnaughton, for the appellant, moved the rule absolute.

Jameson, for the respondents, showed cause. It was in evidence for the respondents that the appellant had ceased to be a member of the Society. [Cooper, J.: But that did not divest him of his share in the property. Chubb, J.: The evidence only is that "he was formerly a member, that he left the orchestra taking the piccolo with him, and that he discontinued attending meetings after the annual meeting in September, 1894." Besides, the recital in the deed of 10th January, 1895, where you declare him to be a member, estops you up to that date. You do not show that he ceased to be a member after that date, even if that fact would help you.] There are rules—[Chubb, J.: Which are not before the court, even if of any assistance. There is another point. By what right can the respondents alone sue as trustees? *Gray v. Pearson* (L.R. 5, C.P. 568), and *Frans v. Hooper* (1 Q.B.D. 45), are against you.] *Jones v. Woollam* (5 B. and A., 769), is in my favour. [Cooper, J.: No. That was an action on a bond which was held to be good at Common Law, as the statute did not avoid securities given to treasurers of friendly societies neglecting to register.]

Macnaughton was not called on to reply.

COOPER, J.: In this case I am of opinion that Hall, at the date of deed, was part owner of the piccolo. It appears to me that he never lost any right in it. This being so, he could not be sued. This being the position, the magistrates were wrong in law, and their decision cannot be upheld. The rule must be made absolute, with costs.

CHUBB, J.: The application for the rule in this case was made to me on behalf of an infant by

his next friend, the usual consent to act as next friend having been filed. A next friend is not required in a proceeding of this kind, as I pointed out upon the application. As to the first objection, I think that notice of the claim may be given on behalf of the claimant. The statute does not mean that the claimant shall make his claim in person. On the second point I agree with my brother Cooper that the evidence showed that the appellant was, up to 10th January last, a part owner of the property, and it has not been shown that his interest has since passed legally to the respondents. On the third ground, the society not being recognised by law as having a legal existence to entitle it to sue by the respondents as its representatives, the proceedings were not brought by the proper parties. *Gray v. Pearson* and *Frans v. Hooper*, before referred to by me, are conclusive on that point. Consequently, the order of the justices is not sustainable.

Rule absolute, with costs.

Solicitors for appellant: *E. Norris & Son*.

Solicitors for respondents: *Roberts & Leu*.

BRISBANE CIVIL SITTINGS.

HARDING, J. 6th May, 1895.

In the Matter of The Crown Lands Act of 1884, and in the Matter of AN APPEAL BY THE WESTERN QUEENSLAND PASTORAL COMPANY, LIMITED, FROM A DECISION OF THE LAND BOARD.

Crown Lands Act of 1884 (48 Vic., No. 28), ss. 21, 30 (5)—Lease—Rent for second period—Relative value.

In considering "the relative value" of a holding under *The Crown Lands Act of 1884*, in order to assess the rent for the second period, the Land Board must regard, amongst other things, the matters specified in sec. 30, subsec. 5, a, b, c, d.

APPEAL by the Western Queensland Pastoral Company, Limited, from a decision of the Land Board, fixing the rent of Mitchell Downs for the second period at 25s. per square mile. The rent for the first period had been at the rate of 20s. per square mile. The assessors

were the Hon. B. B. Moreton and John Donaldson, Esquire.

Feez and Bannatyne for the appellants.

Byrnes, A.G., Rutledge and Wilson for the Crown.

The question arose as to what regulations were laid down in the Act to guide the Land Board in assessing the rental of the second period. The appellants contended that unless the conditions had altered to the benefit of the lessee, there could be no increase of rent. The Crown's contention was that there should be an entire reconsideration of the conditions—sec. 30 (5) *Crown Lands Act of 1884*.

HARDING, J.: It seems that an inquiry *de novo* is necessary when the rent for the second period is being determined. The consideration of all circumstances affecting the rent for the second period should be conducted quite independently of the first assessment. On the first assessment, subsecs. a, b, c, d, of sec. 30 (5), are alone taken into consideration; but on the second and third assessments, full regard must be had to subsecs. a, b, c, d and e.

In order to determine the relative value of the holding, evidence was given of depreciation of the price of stock and station produce.

HARDING, J., after consultation with the assessors, fixed the rent at £1 per square mile on the available area of 363 miles, but refused the appellants costs, feeling bound by the rule laid down by the Full Court (*ante* p. 36).

Solicitors for appellants: *Hart, Flower & Drury*.

Solicitor for Crown: *J. Howard Gill*.

GRIFFITH, C.J.

May 18th, 1895.

BROWNE v. COWLEY.

Jurisdiction of Supreme Court to review proceedings of Legislative Assembly—Judicial Powers of Assembly in matters of Order—Constitution Act of 1867 (31 Vic., No. 38), s. 8.

Action by member against Speaker of Legislative Assembly to recover damages for exclusion under Order of Suspension made by the Assembly. The Standing Orders provided as follows:—

Disturbance by Members.

166. A member shall not make any noise or disturbance while a member is orderly debating, or while any matter is under consideration, and, in case such noise or disturbance is made and persisted in after warning from the Chairman, the Chairman shall call by name upon the member making the same, and if he does not immediately desist shall report his conduct to the House, and such member will incur the displeasure and censure of the House, and may be suspended from the service of the House for such period as the House may think fit.

Held, that Standing Order 166 is within the powers conferred on the Legislative Assembly by sec. 8 of *The Constitution Act of 1867*.

Evidence of facts antecedent to the report of the Chairman on which the order of suspension is made, is not admissible.

The court will not inquire into the regularity of the procedure of the Legislative Assembly in the exercise of its powers.

Taylor v. Barton (11. App. Cas., 197), *Bradlaugh v. Gossett* (12 Q.B.D., 271), and *Haggard v. Pelicier Frères* (1892 A.C., 61) considered.

TRIAL of action before Griffith, C.J., and a jury. *Lilley, Drake and Powers* for plaintiff.

Byrnes, A.G., Power and Shand for defendant.

The plaintiff was a member of the Legislative Assembly. The defendant was the Speaker.

The statement of claim alleged that on the 12th September, 1894, plaintiff being in his place in the Legislative Assembly chamber as a member of the Assembly, the defendant caused him to be taken into custody by the Sergeant-at-Arms, and to be removed from the House, and to be prevented from sitting and voting on the business of the Assembly; and that defendant further prevented the plaintiff from entering the House and the precincts thereof on subsequent days.

The statement of defence set out the Standing Order above stated, and alleged that the plaintiff had, on the said 12th of September, been guilty of disorderly conduct while the Assembly was in Committee of the Whole; that the Chairman of Committees, having named him, had reported him to the House, whereupon a resolution had been passed suspending him from the service of the House for seven days; that the defendant

had caused effect to be given to the resolution, which was the grievance complained of.

The plaintiff, by amendment, denied the disorderly conduct alleged; and set out other Standing Orders, which, he alleged, were not complied with. He also alleged that he was not heard before the suspensory resolution was passed.

Defendant amended his defence, setting out a Standing Order of the Legislative Assembly which adopted, in cases for which no provision had been made in the Standing Orders, the usages of the House of Commons, and setting out a rule of that House which dealt with the suspension of members for disorderly conduct.

Issue was then joined.

In the course of plaintiff's case evidence was tendered as to the action of the Chairman of Committees, and of another member during the sitting of the 12th September, but before the disorderly conduct reported to the House.

Byrnes, A.G., objected. The evidence is irrelevant. It is *res inter alios*. The court cannot inquire into the preliminary proceedings prior to the passing of the resolution for suspension of plaintiff.

Lilley: The evidence is relevant as leading up to and explaining the subsequent conduct of the plaintiff, reported to the House. It also goes to damages.

GRIFFITH, C.J.: I am of opinion that what took place at this period is not relevant to the question of the validity of the resolution or to the amount of damages, if any are recoverable; no allegation is made against defendant of any misdemeanour other than an unlawful exclusion of plaintiff from the House and its precincts. What took place in Committee some hours before cannot affect him on the question of damages.

Evidence was also tendered to show that plaintiff was not in fact guilty of the disorderly conduct alleged in the statement of defence.

Byrnes, A.G., objected on grounds previously urged.

Lilley: The evidence is relevant to the question of the jurisdiction of the House to exclude

plaintiff. That jurisdiction could only be exercised if the facts brought the case within the Standing Orders. The facts sought to be proved have been put in issue by the statement of defence. There is no analogy between the English House of Commons and the Queensland Legislative Assembly. *Fenton v. Hampton* (11 Moo. P.C. 347, pp. 384, 397), *Keilly v. Carson* (4 Moo. P.C. 63, p. 89), *Doyle v. Falconer* (L.R. 1 P.C., 328), *Tooley v. Melville* (18 N.S.W. R. (L.), 192).

Drake: The evidence is relevant as showing what would have been ascertained by defendant and the House if plaintiff had been heard.

Byrnes, A.G.: The cases cited by the plaintiff are all on the point whether the resolutions in question in them were within the jurisdiction of the Legislature. To the extent to which the Legislative Assembly has the privileges of the English House of Commons, the rules as to the examination of the proceedings of the House of Commons apply. The inquiry proposed to be made is consequently not within the province of the court.

GRIFFITH, C.J.: I assume for the present purpose that the regularity of the proceedings after the Chairman's report and before the suspensory resolution can be inquired into. That question will arise later in the case. The cases of *Keilly v. Carson*, *Fenwick v. Hampton*, *Doyle v. Falconer*, and *Taylor v. Barton* established that the powers incident to or inherent in a colonial Legislature are only such as are necessary to the existence of such a body, and the proper exercise of the functions it is intended to execute, and do not extend to punitive action. In this respect the analogy between a House of a colonial Legislature and a House of Parliament in the United Kingdom fails; but, notwithstanding the failure of the analogy in this respect, I am of opinion that in most respects the analogy is complete, and at least in this that the dignity of a colonial Parliament, acting within its limits, requires no less than that of the Imperial Parliament that any tribunal to whose examination its proceedings are sought to be submitted for review should hesitate before it

undertakes the function of examining its administration of the law relating to its internal affairs. In the case of *Taylor v. Barton* the Privy Council expressly declared their opinion that under sec. 35 of the Constitution Act scheduled to the Act 18 and 19 Vic., Ch. 54—which is identical with sec. 8 of *The Queensland Constitution Act of 1867*—either House of the Legislature has authority to make Standing Orders giving itself power to punish an obstructing member, or to remove him from the House for a period longer than the sitting during which the obstruction occurs; and, further, that the express powers conferred by this Act when exercised with the Governor's assent are not limited by the principles of common law applicable to those inherent powers which must be implied without express grant from mere necessity, according to the maxim, *Quando lex aliquid concedit concedere videtur et illud sine quo res ipsa esse non potest*. The Legislative Assembly of Queensland has, in the exercise of the powers conferred by the Constitution Act, adopted Standing Orders for the preservation of order. Standing Order 166, relating to the proceedings in Committee of the Whole House, provides as follows:—"A member shall not make any noise or disturbance while a member is orderly debating, or whilst any matter is under consideration, and, in case such noise or disturbance is made and persisted in after warning from the Chairman, the Chairman shall call by name upon the member making the same, and if he does not immediately desist shall report his conduct to House, and such member will incur the displeasure and censure of the House, and may be suspended from the service of the House for such period as the House may think fit." It follows that it is within the jurisdiction of the Legislative Assembly under certain circumstances to suspend a member from the services of the House for a longer period than the day on which his offence is committed. Now, whether a member has or has not been guilty of making a noise or disturbance while a matter is under consideration is primarily a question of fact, and it is contended for the plaintiff that the existence of this fact is a condition

precedent to the exercise of the punitive power, and that the existence or non-existence of the fact is examinable in this, or indeed any, court which can entertain a complaint for trespass. I think that in dealing with this point the court ought to bear in mind the rule as laid down by Blackstone, and quoted by Sir James Stephen in the case *Bradlaugh v. Gossett* (12 Q.B.D., p. 278): "The whole of the law and custom of Parliament has originated from this one maxim—that whatever matter arises concerning either House of Parliament ought to be examined, discussed, and adjudged in that House to which it relates and not elsewhere." As said by the same learned Judge (page 285), "The House of Commons is not a court of justice, but the fact of its privilege to regulate its own internal concerns practically invests it with a judicial character when it has to apply to particular cases the provisions of Acts of Parliament." These observations apply, I think, to the Legislative Assembly of Queensland, and to the express powers conferred upon it by the Standing Orders, as well as to the House of Commons, and to its privileges and to provisions of Acts of Parliament. In any case that arises before a body possessing punitive powers, the existence of the facts upon which the exercise of those powers depends must be ascertained or adjudged before the power is exercised. The determination of the fact must be made by some person or persons liable to error. If the determination is erroneous, it is an unfortunate circumstance; but as pointed out by the Judicial Committee of the Privy Council in the case *Haggard v. Pelicier* (1892 App. Cas., at p. 68) the insufficiency, or even the utter inadequacy of the reasons for coming to a particular conclusion, cannot affect the jurisdiction to come to that conclusion. And, having regard to the well-known practice of Parliament, I think that Standing Order 166 can only be interpreted as constituting the Chairman of Committees the judge, whether a member has or has not in fact been guilty of the misconduct dealt with by that Standing Order. If he is of opinion that a member has been guilty of miscon-

duct it is his duty to name him and to report the matter to the House with the Speaker in the chair. The functions of the House then begin, and it is entirely in their discretion to determine whether the penal consequences provided by the Standing Order shall follow. They may disagree with the decision of the Chairman, or may decline to visit the offending member with any penal consequences. But I do not think that any court of justice can review the decision of the Chairman. He is called upon to decide on the spur of the moment, so that the business of the House may proceed in an orderly manner. He is human and liable to err. His judgment is liable to be disturbed by the very discussion—probably heated—that is going on. It may be that if he had the opportunity of some days', or even some hours', reflection he would come to the conclusion that what is done is not really noise or disturbance within the meaning of the Standing Order; but if his decision on the question of fact thus necessarily arrived at on the spur of the moment were liable to be reviewed, after a long interval, by a legal tribunal, and the protection of the Speaker or officers, or indeed the members of the House, were to depend on the conclusions that that tribunal arrived at, an intolerable burden would be imposed upon members of the Legislature in the discharge of their duties. I am, therefore, of opinion that the functions of the Chairman under this Standing Order are *quasi* judicial, and that his decisions must be dealt with on the same footing as the decisions of a tribunal, and cannot be challenged in a court of law in a proceeding founded upon the erroneousness of the decision, the court of law not being constituted an appellate court for that purpose. I think, therefore, that evidence of the proceedings in the Committee antecedent to the report of the Chairman to the House is not admissible. The facts as to these proceedings are, however, expressly put in issue by the statement of defence. Under ordinary circumstances, therefore, and especially having regard to the novelty of the point, I should be disposed to admit the evidence, leaving the

ultimate decision to a later period of the case; but having regard to the unseemly conflict and even scandal that might arise if this court were to assert the right to sit as a tribunal of appeal from the determination of the Legislative Assembly on a question of fact as to a matter of which it is necessarily the primary judge, I think I ought not, against my own opinion, to be the first judge to enter upon such an investigation. I therefore reject the evidence.

Evidence was then given to the effect that when the Chairman made his report to the House, a motion for the suspension of the plaintiff for seven days was made, and was put forthwith, and that the defendant, as Speaker, refused to allow any amendment or debate.

Byrnes, A.G., at the close of plaintiff's case, moved for a nonsuit. No question is raised by the evidence which the court is competent to try. Courts of justice can inquire whether a power claimed by a colonial House of Legislature is within their competency, but no case can be cited in which, in a matter within their jurisdiction, the preliminary proceedings have been examined. In considering the exercise of the undoubted powers of the Legislative Assembly, the same principles will be applied as in the case of the House of Commons. *Glasse v. Murphy* (2 A.J.R., at p. 25), *Huffer v. Allen* (L.R., 2 Ex. 15), and *Bradlaugh v. Gossett* (12 Q.B.D., at p. 286).

Lilley: A nonsuit at this period will cause additional expense in the event of a new trial being ordered. The Legislative Assembly has only limited powers. The conditions precedent to the exercise of those powers must be observed to give validity to their resolutions. These conditions are matters of jurisdiction, not of procedure. The court is competent both to inquire whether the conditions have been fulfilled, and to construe the Standing Orders. An erroneous construction of a Standing Order by the Speaker will be reviewed by the court. Standing Order 166 is *ultra vires*, as it purports to authorise excessive or indefinite punishment. *Murphy v. Glasse* (L.R., 3 P.C. 560, p. 572), *Stockdale v.*

Hansard (9 A. & E., p. 165), *Attorney-General of New South Wales v. Macpherson* (L.R., 3 P.C. 268, p. 279), *Landes v. Woodward* (2 Duval, 204).

Powers: Under the Queensland Standing Orders and at common law the plaintiff was entitled to be heard on the resolution for his suspension.

GRIFFITH, C.J., referred to *Slattery v. Naylor* (18 App. Cas., 446).

GRIFFITH, C.J.: The evidence that has been adduced for the plaintiff shows that on September 12, 1894, a resolution was passed by the Legislative Assembly that Mr. Browne, the member for Croydon (the plaintiff), be suspended from the service of the House for seven days, and that the defendant, as Speaker, gave effect to this resolution by causing the plaintiff to be removed from the House, and preventing his entering it during that period. The Attorney-General has moved for a nonsuit on the ground that it appears from the evidence that the resolution was one which under the Standing Orders the Legislative Assembly had authority to adopt, and that the defendant did no more than his duty as Speaker in giving effect to it. Mr. Lilley, for the plaintiff, contends that the resolution was invalid, on the grounds that Standing Order 166, under which it was passed, is *ultra vires* and inoperative, and further that upon the true construction of the Standing Order, assuming it to be *ultra vires*, the Legislative Assembly had no authority to pass the resolution under the circumstances disclosed by the evidence. Those circumstances, so far as they are material to the question, are that immediately upon the report being made to the House by the Chairman of Committees to the effect that the plaintiff had been named in Committee for disorderly conduct, the motion for suspension was proposed; that the defendant, as Speaker, ruled that no debate could be allowed; that he refused to allow any debate or any explanation or defence by the plaintiff; and that he forthwith put the question to the House, whereupon it was passed in the affirmative on division. It was also objected, incidentally, that the report of the Chairman as recorded in the journals of the

House did not follow the terms of the Standing Order; but this objection was not pressed, and I do not think that there is anything in it, the report being substantially as it was evidently treated by the House, made under the Standing Order. The matter has been fully argued, and I have derived great assistance from the arguments on both sides. I have already expressed my opinion, in deciding the question of the admission of evidence, that it is not the province of this court to review the facts antecedent to the Chairman's report. The question that now arises for decision is whether the court can examine the validity of the resolution itself, it being one which, under the Standing Orders, the House had authority to pass, if the circumstances were such as to warrant its exercising that authority. With regard to the validity of the Standing Order, I am of opinion that the court is bound to act upon the opinion of the Judicial Committee of the Privy Council, expressed in the case of *Taylor v. Barton*, that either House of the legislature of a colony, having the powers conferred by sec. 8 of *The Queensland Constitution Act of 1867*, can make Standing Orders conferring authority to punish obstructing members by removing them from the House for a period longer than the day on which the obstruction occurs. It is urged that the period of removal must be reasonable, and that a power to suspend for such period as the House may think fit is unreasonable. The period must, however, under the Standing Order, be fixed by the House; and in the face of the opinion of the Judicial Committee in the case of *Slattery v. Naylor* (18 Appeal Cases, 446), I do not see my way to apply the old common law doctrine as to the reasonableness of by-laws to the case of a Standing Order made by a House of Legislature with the approval of the Governor. It was, however, urged by Mr. Powers that a similar power existed under the rules and usages of the House of Commons, which had been adopted by the Legislative Assembly of New South Wales before the happening of the events which came up for review in *Taylor v. Barton*, and that the attempted adoption was in that case inferentially

held invalid. It is true that the report of that case, in 11 Appeal Cases, sets out that fact, but on reference to the report of the case in 6 N.S.W., L.R., I find that those rules and usages were not pleaded. The case was decided on demurrer, and those rules and usages were not, therefore, before the court or the Judicial Committee; and I do not feel myself at liberty, by conjecture as to what they would have thought if the fact had been pleaded, to detract from their opinion as to the powers of the Legislative Assembly to make valid Standing Orders to the effect of that now under consideration. Assuming, then, that the Standing Order is valid, the question arises as to the manner in which a resolution of the House adopted under it is to be regarded. On the one hand it is contended that it should be regarded as a judicial determination, which being *prima facie* within the jurisdiction of the determining body, must have full effect given to it on the principles applicable to judicial determinations. On the other hand, it is contended that the authority of the Legislative Assembly to pass such a resolution depends on a strict compliance with the terms of the Standing Order itself, which, it is said, must for this purpose be construed by the court. I think it is clear that the plaintiff's case must rest on the assumption that the resolution is absolutely void. If it was passed under circumstances which, if an appeal lay to another tribunal, would justify its reversal on the merits or by reason of irregularities in procedure, that fact would not, according to the well-known rules applicable to erroneous or irregular judgments, justify this court in treating it as void. There is evidently no tribunal except the Legislative Assembly itself that could reverse the decision. The inquiry is therefore limited to ascertaining whether the alleged irregularities make the resolution void. I am of opinion that when the Legislative Assembly was empowered to make standing orders for preserving order and for imposing the punishment of exclusion upon offending members, it had also conferred upon it all authorities necessary to give effect to those powers, and without which the powers themselves

would be idle and nugatory. From the necessity of the case the fact of the offence must be ascertained and adjudged before the penalty can be inflicted. The penalty is to be inflicted instantaneously, so as to remove the obstruction, and enable the business of the House to be proceeded with. If, then, the House is not itself to be intrusted with the power of adjudication, the pretended power of punishment would be a mere mockery and insult. For the validity of the punishment would depend not upon the facts as they appeared to the authority which is called upon to inflict it, but as they afterwards appear to some court of law. The Legislature would be in a better position indeed if the matter of fact were referred to justices for adjudication before it proceeded to pass sentence. This is manifestly not the meaning of the Judicial Committee when they affirm the power of the Legislature to adopt such Standing Orders. Such a construction would strike the House with absolute impotence in dealing with a case of disorder or obstruction, and must, I think, be rejected. I think, therefore, that the House is *ex necessitate* empowered to adjudicate upon the matter. And holding this view I adopt, as I have already said in the course of the case, the language of Sir James Stephen in *Bradlaugh v. Gossett* (12 Q.B.D., at p. 278), referring to the House of Commons, and apply it to the Legislative Assembly of Queensland. The House is not a court of justice, but the fact of its privileges to regulate its own internal concerns practically invests it with a judicial character when it has to apply to particular cases the provisions of its Standing Orders relating to those concerns. I adopt, also, and apply to the Legislative Assembly of Queensland, acting within its jurisdiction, the language of Parke, B., delivering the judgment of the Court of Exchequer Chamber in the case of *Howard v. Gossett* (10 Q.B., at p. 456) with regard to the House of Commons: "At least as much respect is to be shown, and as much authority to be attributed to these mandates of the House as to those of the highest courts of the country, and if the officers of the ordinary courts are bound to obey the process delivered to them,

and are therefore protected by it, the officers of the House are as much bound and equally protected." A different notion may have prevailed at one time with regard to the legislatures of what were somewhat contemptuously referred to as the dependencies. But I think that any other view than that which I take is inconsistent with modern ideas as to the status and functions of the legislatures of the great self-governing colonial States of the Empire. The Legislative Assembly of Queensland, it is true, has not all the attributes of the House of Commons, but it has some of them, and when it is discharging functions analogous to those of the House of Commons, I am of opinion that the same respect should be paid to it, and the same effect given to its decisions, as in the case of the House of Commons. I hold, therefore, that the Legislative Assembly has under the Standing Orders authority to adjudicate upon a report of the Chairman of Committees, and to pass sentence of exclusion. Every adjudication involves, or may involve, questions both of fact and of law, and the adjudicating authority must of necessity determine both in the first instance. The adjudication may also involve questions of procedure. If so, they must also be determined in the first instance by the adjudicating authority. As I have previously said, the inadequacy of the reasons for coming to a particular conclusion cannot affect the jurisdiction to come to that conclusion. This rule applies even to the case of an inferior court of justice, the decisions of which cannot be treated as void on the ground that they were erroneous in fact or in law, or that there was an error in the mode of procedure. *A fortiori*, the rule applies to a decision of a House of the Legislature. It is contended that this rule does not cover the case when a person is not heard before he is sentenced. I apprehend, however, that even in an inferior court, if the party were within the jurisdiction of the court, and the court had jurisdiction over the subject matter, an omission to hear him would be matter of appeal only, and would not render the judgment void. An action will not lie against a judge of an inferior court in respect of an

erroneous judgment against a person and in respect of a matter both within his jurisdiction, whether the error is one of fact or of law, or in matter of procedure. And his liability depends on the facts as they appear to him when he is called upon to exercise his jurisdiction. (*Calder v. Halkett*, 3 Moore, P.C., 28, 58). There is no question in the present case that the plaintiff was amenable to the jurisdiction of the House, or of its jurisdiction to deal with such matters of complaint. The error alleged, if it be one, is in my opinion one of procedure only, of which I think the Legislative Assembly themselves are the judges, without appeal to this court. It is hardly necessary to point out that the practice of Parliament is a branch of knowledge of itself, of which successive Speakers have been distinguished exponents. I believe this is the first instance in which the ruling of a Speaker, which is subject to appeal to the House itself, has been sought to be submitted to the review of a court of justice. I am not disposed to be the first judge to review a Speaker's decision on the construction of the Standing Orders—a function which requires not only a consideration of the printed document, but an acquaintance with the law and practice of Parliament, with reference to which the Standing Orders themselves are framed, and without which the judge undertaking the duty would be ill-equipped for the task; although, if the plaintiff's contention is valid, any justice sitting in the Small Debts Court may be called upon to discharge it. On the whole, therefore, I am opinion that it is not within the province of this court to act as a court of appeal from the decision of the Legislative Assembly upon a motion to suspend a member under Standing Order 166, when it once appears, as it does in this case, that a report was made by the Chairman of Committees, upon which such a motion could be founded. That this is, in substance, such an appeal, is pointed out by Bayley, J., in *Burdett v. Abbott* (14 East, at pp. 161–2). Further, I do not think that, as a matter of law, the resolution is void by reason of the plaintiff not being heard

in the House before it was passed, even if the Standing Orders require that he should be so heard, or by reason of the absence of a previous resolution of censure, even if the Standing Orders contemplate such a resolution. Holding these views, I think it would not be consistent with the dignity of this court to offer an opinion as to the manner in which an independent branch of the constitution, over which this court has no authority, should construe its own rules and orders. I may, however, be pardoned for remarking that it is by no means obvious to my mind that a member who, after being named by the Chairman for disorderly conduct, does not desist from it, can fairly say that he has not been heard, or that it was ever contemplated by the Standing Orders that a member reported under such circumstances should be heard again, although the House may of course hear him as a matter of grace. It follows that, in my judgment, the evidence discloses no case against the defendant which this court can entertain. I have been urged, however, to let the case go to the jury for the assessment of damages. If I thought that by doing so I should be aiding the administration of justice, I would accede to the request, although I hold that a judge ought not to hesitate to give judgment of nonsuit when a defendant who, in his opinion, is entitled to that judgment, claims it, unless it is to the interests of both parties to take the opinion of the jury. I confess, however, that I do not feel myself capable of giving a proper direction to the jury in the interests of the plaintiff, in a case of alleged personal injury, when I think that he has sustained no actionable wrong. I therefore give judgment of nonsuit.

Solicitors for plaintiff: *J. N. Robinson & Co.*

Solicitors for defendant: *Macpherson & Feez.*

ERRATUM.

In re DWYER.—Ante p. 228. Judgment of Griffith, C.J., in second column, should read: "I quite agree with my brother Real. I do not think the word 'unusual' means unusual between party and party."

JUNE SITTINGS OF FULL COURT.

Re BOWLER, Ex parte CALDWELL.

Petitioning creditor's debt—Assignment of interest in debt after act of insolvency—Act available for insolvency—Insolvency Act of 1874 (38 Vic., No. 5), ss. 47, 112, 113.

C. and her husband were judgment creditors of B. upon a judgment recovered in a District Court in an action in which they sued jointly for damages in respect of a personal injury to C., and consequential loss to her husband. It appeared on the face of the judgment that the damages were separately assessed, the amount awarded to C. being £25, and that awarded to her husband being £2 2s. The costs were taxed at £24 17s.

While so indebted, B. committed an act of insolvency, and C. and her husband then presented a joint creditors petition against B., which was dismissed on the ground that they were not jointly interested in a debt of £50. C.'s husband then assigned his interest in the judgment debt to her, and she presented a petition against B. for adjudication, relying on the same act of insolvency.

Held (GRIFFITH, C.J., *dissenting*), that the word "subsisting" in sec. 47 of *The Insolvency Act of 1874* means only "existing," and that a creditor for £50 is a competent petitioning creditor, although at the time of the act of insolvency the debts represented by that amount were due to several creditors, who could not collectively have presented a petition for adjudication.

Held, by GRIFFITH, C.J., that an adjudication cannot be made upon an act of insolvency, unless when it was committed it was available for adjudication on the petition of the then existing creditors.

PETITION for adjudication presented by Caldwell against Bowler. Referred by Griffith, C.J., in Chambers, to the Full Court.

Blair for petitioner.

Arthur Lilley for respondent.

The facts and argument appear fully in the judgments of the learned judges.

GRIFFITH, C.J.: When the act of insolvency was committed, petitioner and her husband were judgment creditors of the respondent upon a judgment recovered in the District Court at Ipswich, in an action in which they sued jointly for damages in respect of a personal injury to petitioner and consequential loss to her husband. It appears on the face of the judgment that the damages were separately assessed, the amount awarded to petitioner being £25, and that awarded

to her husband being £2 2s. The costs were taxed at £24 17s. 5d. Petitioner and her husband presented a joint petition for adjudication against respondent, which was dismissed by Real, J., on the ground that they were not a single "creditor" for an amount of £50 within the meaning of the Act. Petitioner's husband then assigned his interest in the judgment debt to her, and she presented the petition now under consideration, claiming to be a creditor for £50. And so, no doubt, she is. But it was objected for the respondent that her present debt of £50 was not, at the time of the act of insolvency, a subsisting debt within the meaning of sec. 47, which provides that the petitioning creditor's debt must be a liquidated sum due at law or in equity, and subsisting as well at the time when the act of insolvency was committed as at the time of presenting the petition. The words "subsisting," &c., were not in the English Bankruptcy Act of 1869, but it was held, following the settled rule in bankruptcy before that Act, that the debt of the petitioning creditor must be a debt which existed at the time when the act of insolvency was committed (*Ex parte Hayward*, L.R. 6 Ch., 546). *The Bankruptcy Act* (5 Geo. II., c. 30) provided (sec. 23) that a commission of bankruptcy should not be issued upon the petition of one or more creditors unless the debt, being due to one creditor, amounted to £100; or, being due to two creditors, amounted to £150; or, being due to three or more creditors, amounted to £200. On the construction of this section, Buller, J., a very distinguished judge, was of opinion that a single creditor petitioning must be a creditor for £100 at the time of the act of bankruptcy. But the Court of King's Bench held that the requirements of the section were fulfilled if the creditor's debt of £100 existed at the time of the petitioning (*Glaister v. Heuer*, 7 T.R., 498). In the absence of the words now under consideration and of the provisions of secs. 112 and 113, to which I will presently refer, this case should probably govern our decision. The first question, therefore, is what effect, if any, is to be given to the words

"subsisting," &c. The construction contended for by the petitioning creditor gives them no effect, inasmuch as the section would, on the authorities already cited, have the same meaning if they were omitted. It is a rule of construction of statutes that effect is, if possible, to be given to every word. Another rule is to look at the precise words used, and to construe them in their natural and ordinary sense, unless it would lead to some absurdity or manifest injustice, or is inconsistent with other plain provisions of the statute, and if so, to modify the words so as to avoid that result. In the connection in which the word "subsisting" is used in sec. 47, read in conjunction with sec. 46, I am disposed to think that its natural and ordinary meaning is "maintaining a continued existence so far as regards the essential elements of a petitioning creditor's debt." Now, those elements are that the debt or debts must be (1), liquidated; (2), due at law or in equity; and (3), of an amount of £50 or upwards if due to a single creditor, of £70 or upwards if due to two creditors, or of £100 or upwards if due to three or more creditors. The first two of these elements are necessarily involved. I fail to see any sufficient reason for excluding the third.

It is said, on the other hand, that the word "subsisting" means no more than "due by the debtor." I would, however, observe that "subsisting" is an unusual word to express so simple an idea. And I have already pointed out that this construction adds nothing to the meaning which the section would bear without the words. On this point, however, I do not feel sufficient confidence to justify me in basing a decision upon it, or assuming that the natural and ordinary meaning of "subsisting" is merely "due by the debtor," or "existing." I think that that construction of sec. 47 would be inconsistent with other provisions of the Act, as I will proceed to show. Sections 112 and 118 protect the title of persons who deal with the debtor without notice of any act of insolvency committed by him, and available against him for adjudication. The

statute, therefore, draws a distinction between acts of insolvency available, and acts of insolvency not available, for adjudication. What is the meaning of the word "available"? I think its natural and ordinary meaning is "capable of being used," or "of which advantage can be taken." Both expressions involve the existence of a person who can use, or avail himself, or take advantage, of the act. In *Hood v. Newby* (21 Ch.D., 605) the question was whether an act of bankruptcy committed by failing to comply with a debtor's summons (of which under the Act of 1869, advantage could only be taken by the creditor who took out the summons) was, under the circumstances of the case, an act available for adjudication within the meaning of the section corresponding to sec. 112 of the Queensland Act. It was contended for the plaintiff that an act of bankruptcy available for adjudication must be an act available on the petition of the particular creditor who obtained the adjudication. The court held that this was not the true construction. It had been previously decided that the act of bankruptcy referred to in that section must be one which was available in point of time, i.e., it must have been committed within six months before the presentation of the petition on which the adjudication was actually made. On the question whether the act in question was available for adjudication within the meaning of the section, Jessel, M.R., puts the point thus: "Was it available against him (the debtor) for adjudication? Undoubtedly it was. The creditor might make him a bankrupt upon it" (p. 608). The Master of the Rolls was obviously speaking of the moment when the act was committed. In the same case, Brett, L.J., suggesting the case of several debtors' summonses against the same debtor, said: "The disobedience to each of these several debtors' summonses is an act which is available as an act of bankruptcy. It is available not for all persons, but each of them is available for a particular person" (p. 610). It is clear that the learned Lord Justice was also speaking of the moment when the act was committed. Both of the learned

judges base their judgment upon the fact that at that moment there was a creditor in existence for whom the act was then available as an act of bankruptcy. And this fact was necessary to support the decision, for the act of bankruptcy under consideration in *Hood v. Newby* was never available for anyone but that creditor, and it had ceased to be available to him by reason of his subsequent dealings with the debtor. The only period, therefore, at which its availability could be asserted or could be material was the date at which it was committed. I think, therefore, that an essential condition of the availability of an act of insolvency for adjudication is the existence, at the moment when it is committed, of a creditor or creditors who can then take advantage of it; that is, a creditor or creditors whose debts amount to the sums prescribed by sec. 46. Sec. 74 prescribes the conditions on which the trustee's title has relation back to an act of insolvency before that on which the adjudication is founded. This was necessary, for if no limitation had been made the title would have had relation back, notwithstanding that when it was committed there were no creditors in existence who could take advantage of it. But there was no need to prescribe the same conditions with respect to the act on which the adjudication is founded, if, as I think, the adjudication could not be made unless there were such creditors in existence at the time of that act, i.e., unless the act was then available for adjudication. The construction which the petitioning creditor seeks to give to sec. 47 involves this consequence: that every man who commits an act of insolvency, owing £50 and no more, distributed amongst several creditors, is liable to be adjudged insolvent at any time within six months, although it is clear that the act of insolvency was, when committed, not available for adjudication against him at the suit of all his creditors put together. If this is the law, it follows that an act which, when committed, creates no legal consequence, is capable of being expanded or developed by the acts of his creditors into a foundation for adjudication, the complete

foundation or cause of suit consisting in part of the act of the debtor and in part of the subsequent acts of the creditors antecedent to the presentation of the petition (*Read v. Brown*, 22 Q.B.D., 128). Moreover, the title of a person dealing with notice of this act of insolvency, and with full knowledge that the debtor did not owe more than £50, which was distributed amongst several creditors, would be protected, because the act when committed was available for adjudication. The title of the trustee would, however, relate back to it, because it is the act on which the adjudication was founded (sec. 74). The same act, therefore, would have been made the foundation of an adjudication, and yet would protect the person dealing with the debtor, because it could not be made the foundation of an adjudication, which, as Euclid says, is absurd. *Allegans contraria non est audiendus*. These reasons are, to my mind, conclusive that the word "subsisting" cannot merely mean "due by the debtor." I think that the whole matter may be summed up thus:—

A cause of action or suit involves two things, a complete right of suit on the part of the actor, and a complete liability on the part of the defender. I think that the word "subsisting" in sec. 47, means that in the case of the particular cause of action to which effect is given by an adjudication of insolvency, these two conditions must exist at the time of the act of insolvency as well as at the time of presenting the petition. The debtor must have committed an act of insolvency within six months, and he must at both periods have creditors competent to take advantage of it. The identity of the debts at the two periods is also necessary; but not the identity of the creditors. In my opinion, therefore, the petition should be dismissed. I understand, however, that my learned brothers are of a contrary opinion, and that I am consequently once more found to be wrong in my understanding of the provisions of the *Insolvency Act of 1874*. I much regret the difference of opinion, but I am unable, following the rules governing the construction of statutes as I have learned them, to arrive at any other conclusion

than that which I have stated; and my reasons for which, no doubt inadequate, I have, from respect to the opinion of my brothers who differ from me, given at greater length than I should otherwise have done.

CHUBB, J.: I am unable to agree with the extremely well reasoned opinion delivered by the learned Chief Justice. The requisites for a valid adjudication of insolvency upon the petition of a creditor are: (1) A debtor liable to the provisions of the statute (ss. 30, 31); (2) an act of insolvency committed within six months before the presentation of the petition (ss. 44, 45); and (3) a creditor competent to present a petition—such competency to be ascertained by the amount of his debt (s. 46) and the nature of his debt (s. 47). With the exceptions mentioned in s. 30, the Act extends and applies to “all debtors resident within the colony, or having property within the colony” (s. 31).

The debtor in this case was a person resident in the colony, and did not come within any of the exceptions. Within six months before the presentation of the petition he committed an act of insolvency, and at the time of the presentation of the petition he owed the petitioning creditor, and there was then subsisting, a debt of sufficient amount. None of these facts are disputed. The sole question then remaining for decision is, in my opinion, Was the creditor competent to present the petition? And the answer to that question depends upon the construction of s. 47, which requires the debt of the petitioning creditor to be “subsisting as well at the time when the act of insolvency was committed as at the time of presenting the petition.” The debt subsisting at the time of presenting the petition was acquired by the petitioner after the act of insolvency by a valid assignment. Before assignment it existed in the form of two debts, due to two creditors, not being partners, and these debts not being together sufficient in amount to support a petition by two creditors, they could not so take advantage of the act of insolvency. It has been contended by counsel for the debtor that

by reason of this disability the debt was not subsisting within the meaning of the statute at the time of the act of insolvency. No case in which this has been so held has been cited, nor have I been able to discover any.

In *Ex parte Cyrus* (L.R. 5, Ch. 176) Giffard, L.J., at p. 179, says: “The authorities from Lord Hardwicke downwards are all one way, and establish that the transfer after an act of bankruptcy but before fiat, of a debt which was due before the act of bankruptcy, makes the transferee a good petitioning creditor.”

In *Ex parte Haycard* (L.R. 6, Ch. 546), Mellish, L.J., at p. 549, says: “It has always been the settled rule that the debt of the petitioning creditor must be a debt which existed at the time of the act of bankruptcy. The law was so settled not on account of express words in any of the Bankruptcy Acts, but because it would be manifestly unjust that a person who commits an act of bankruptcy, and who happens to have no creditors, or who pays his creditors in full, should be liable to be made bankrupt on account of that act by some person to whom he afterwards becomes indebted.”

In *Glaister v. Heuer* (7 T.R., 498), a case decided in the year 1798, the bankrupt at the time of the act of bankruptcy was indebted to several creditors in sums individually less than the statutory amount of £100. To enable A, one of the creditors, to become a petitioning creditor, another, B, after the act of bankruptcy, transferred to A his (B's) debt, the two sums together making up the statutory amount. It was objected that as A and B by joining their demands together could not have made a legal petitioning creditor's debt, it was a fraud on the bankruptcy laws to do that indirectly which could not have been done directly, as was so considered by Buller, J., in giving his judgment in the case of *Bingley v. Maddison*, where he said “That if two creditors had each of them bills of £50 on the bankrupt at the time of his bankruptcy, they could not by a subsequent endorsement from one to the other make a petitioning creditor's debt of £100.” The court,

however (Kenyon, C.J., Ashurst, Grose and Lawrence, J.J.), held the contrary. Lord Kenyon, C.J., at p. 499, said: "All that the Act of Parliament requires is, that there should be an existing debt of £100 in the petitioning creditor; this petitioning creditor had such a debt at the time of petitioning, and that is sufficient to support the commission. I confess I cannot accede to what is supposed to have been said by Buller, J., in the case of *Bingley v. Maddison*; the Act of Parliament only says that no commission shall be taken out 'unless the debt of the creditor petitioning for the same do amount to the sum of £100.' Then when is that debt to exist? At the time of the petitioning? It has been several times decided, and indeed it was admitted in this case, that it is not necessary that the debt should exist in the petitioning creditor at the time of the act of bankruptcy: then why should we introduce nice distinctions that are not warranted by the Act of Parliament?"

If the word "subsisting" had been in the statute upon which this case was decided, it would have concluded the present case. To give effect to the contention of the debtor's counsel, it would be necessary to hold that "subsisting" means something more than merely existing. The learned Chief Justice has expressed the opinion, for the reasons he has given, that a subsisting debt must be taken to mean not only an existing debt, but one available for adjudication at the time of the act of insolvency. I am unable to adopt this view. It may very well be that in questions arising under the 112th and other sections mentioned, this construction may be necessary. It will be sufficient to determine that when those questions arise; but for the purpose of adjudication simply I am not prepared to hold that "subsisting" means anything more in this section than existing as a debt at the time of the act of insolvency and of the presentation of petition. I think this view is consistent with and is supported by the authorities, and that such a construction does not conflict with those other sections referred to, to which full effect can, I think, be given. I am therefore of

opinion that the petitioning creditor was competent to present this petition, and that an order of adjudication should be made upon it.

REAL, J.: The sections of the Insolvency Act upon the interpretation of which our decision depends are 30, 31, 44 to 47 inclusive. These sections point out the persons subject to the provisions of the Insolvency Act with regard to adjudications, the acts of insolvency, and the persons who are competent to petition. S. 30 enacts: "Limited partnerships and companies corporate or registered under *The Companies Act 1863* shall not be adjudged insolvent." S. 31 enacts: "Except as aforesaid the provisions of this Act respecting adjudication of insolvency shall extend and be applicable to all debtors resident within the colony." The respondent in this case is resident within the colony. He is a debtor, and he was so before and at the time of the alleged act of insolvency upon which this petition is founded. Therefore he is a person to whom the provisions of this Act as to adjudication are applicable. S. 44 says: "Any debtor liable to the provisions of this Act who shall have committed any of the following acts shall be deemed to have committed an act of insolvency, and shall be liable to be adjudicated insolvent upon the petition of any creditor or creditors competent to present such petition, that is to say—here follow a number of acts—(10) "If a debtor having against him the sentence, judgment or decree of any competent court, and being thereunto required has failed to satisfy the same, or to point out to the officer charged with the execution thereof sufficient disposable property to satisfy the same." S. 45 says that no person shall be adjudged an insolvent on any of the grounds in the last preceding section mentioned unless the act of insolvency on which the adjudication is grounded has occurred within six months before the presentation of the petition for adjudication. S. 51 provides a short form for stating acts of insolvency in petitions. The petition in the case now before us, states No. 10, as required by s. 51, and alleges that it was committed at a time within six months from the

presentation of the petition, and the facts alleged in petition are not disputed. Now, then, we have a person subject to the Act, who has committed one of the acts mentioned in s. 44, within the time mentioned in s. 45, and therefore, in the words of s. 44, "liable to be adjudicated insolvent upon the petition of any creditor competent to present a petition," and the only question remaining for consideration is whether the petitioner is a creditor competent to present a petition. Secs. 46 and 47 specify what is necessary to entitle a creditor to present a petition. S. 46: "A single creditor if the debt due to him by a debtor amounts to £50 or upwards may present a petition praying that the debtor be adjudged an insolvent, and alleging as the ground for such adjudication any one or more of the acts or defaults hereinbefore defined to be acts of insolvency." S. 47, so far as material, is in these words: "The debt of the petitioning creditor must be a liquidated sum due at law or in equity, and subsisting as well at the time when the act of insolvency was committed as at the time of presenting the petition." Here the debt is a judgment debt, and therefore a liquidated sum. The judgment was for husband and wife, and the interest of the husband has been assigned to the wife, the present petitioning creditor. An assignee of a debt was even before the passing of the Judicature Act, held to be entitled to present a petition under s. 6 of the English Act, where the words used were "a liquidated sum due at law or in equity" (see *Ex parte Cooper, in re Baillie*—L.R. 20 Eq. 762). In this case the assignment has not only been made so as to bring the petitioning creditor within that case, but so as to convey the legal title under the provisions of the Judicature Act; therefore this creditor has a debt due at law and in equity within the meaning of s. 47. The amount of the debt is more than £50. There is no dispute that it is now subsisting and was subsisting at the time of the presentation. The only question remaining for consideration is the meaning of the words "subsisting at the time the act of insolvency was committed." The

primary meaning of the word "subsist" is to exist (Imperial Dictionary). It seems to me that effect is given to the ordinary and natural meaning of the words "subsisting as well at the time when the act of insolvency was committed as at the time of presenting the petition," by holding that the liquidated sum due at law or in equity to the petitioning creditor, when he presents his petition, must be a sum due and owing by the debtor at the time when he committed the act of insolvency. It was contended at the bar that these words of s. 47 ought to be construed as requiring that at the time when the act of insolvency is committed, the debt be not only due by the debtor, but then due to the petitioning creditor. This is not an impossible but it certainly is a forced construction, and it seems difficult to suppose that the legislature could have meant a construction which would necessitate reading in words such as "and due to the petitioning creditor," when the same intention could be clearly and beyond doubt so easily expressed by omitting altogether the word "subsisting," and writing after the words, "liquidated sum due," the words "to him." Other constructions are suggested, but I think it unnecessary to enter into the consideration of them. The word "subsist," if it has not expressly received a judicial interpretation, is a word which has been used by Lord Ellenborough in his judgment in *Moss v. Smith* (1 Camp., 489), in law reports and books always in the hands of the profession, to express the meaning which it seems to me to bear in this section, and that is as equivalent to existing or owing by the debtor at the time he committed the act of insolvency. See *Chitty's Digest* (vol. i., 288) and marginal note to *Moss v. Smith* (1 Camp., 489) and judgment (year 1808).

It is not necessary for me to trace the history of the bankruptcy laws. The bankruptcy laws were directed against fraudulent debtors, and as a man could not reasonably be held, in the absence of evidence, to intend to defraud by non-payment of his debts or improper dispositions of his property, persons who had no claim against him in respect of a liability existing when he did the

act. From the earliest times in England it was held that to make a man insolvent the petitioner's debt must be one which was due by the debtor at the time when he committed the act of insolvency—at all events since the year 1817—and without any conflict it has also been held that the debt need not be one due to the petitioning creditor at the time of the act of bankruptcy, and that the amount of debt required to qualify a single creditor to present a petition is the same, whether at the time of the act of insolvency it was due to the petitioning creditor, or had since been assigned to him by persons whose debt did not amount to sufficient to qualify the persons assigning as joint petitioners (*Glaister v. Hower*, 7 Term Rep., 498). In *Moss v. Smith* (1 Camp., 489) Lord Ellenborough uses the very words of our section in stating the requirements of the English law. In other cases the rule is stated to be "that the petition must be founded on a debt which existed at the time of the act of bankruptcy"; and again, that the debt of the petitioning creditor must be owing at the date of bankruptcy (*Ex parte Hayward*, L.R. 6 Ch., App. 546; and *Ex parte Sadler, re Whelan*, 39 L.J. (N.S.), 361). In the one the word "existed" is used, and in the other the word "owing," at date of bankruptcy, as meaning the same thing, and in each it was held that the rule had not been interfered with by *The Bankruptcy Act of 1869*. As already pointed out, the law of England, when the Act of 1869 passed, which was not interfered with as declared by the above cases, required that at the time of presenting the petition, the petitioning creditor's debt must be a debt subsisting (or due or owing, each of the words being used to mean the same thing) at the time of the act of insolvency. *Moss v. Smith* (1 Camp., 489) did not require such debt to be due to the petitioning creditor. *Ex parte Cyrus* (L.R. 5 Ch. 176 at 179), *Re Baker* (58 L.J., 233) fixed the time for determining the amount of the debt which would entitle a single petitioning creditor to present a petition as at the time of presenting. *Glaister v. Hower* (7 Term Rep., 489) expressly decides that it mattered not in considering the amount of the petitioning

creditor's debt that such debt was acquired.

The continuance of the rule after the passing of the Act of 1869 was challenged in England (see cases *Ex parte Hayward* and *Ex parte Sadler, re Whelan*), and although the continuance of the rule after that Act of 1869 was established, it was reasonable that our Act, when brought before the Legislature in 1874, should contain express provisions on the disputed point. That express provision is in the very words of the judicial decisions establishing the rule. I do not see that we interpreting the section are at liberty to give to the section any other meaning than the meaning conveyed by like words dealing with the same subject, and in fact establishing the law by judicial authority, of which this section was really only an expression, as intended to continue notwithstanding the repeal of all former Acts. As I have already stated, I think, upon the construction of s. 47, apart from authority, I would construe the words, "subsisting as well at the time when the act of insolvency was committed," as meaning "existing then as a debt." But the English cases *Moss v. Smith*, *Ex parte Cyrus*, *Re Baker*, *Glaister v. Hower*, *Ex parte Hayward*, and *Ex parte Sadler, re Whelan (supra)*, seem to me conclusive that the words of s. 47 mean, and mean only, that the petitioning creditor's debt must be owing by the debtor when he commits the act of insolvency due to the petitioner when he presents his petition, and if only one petitioning creditor, then to the amount of £50; if two, £70; if more, £100. The argument at the bar, that if this be the construction, a debtor committing an act of insolvency when his debts did not exceed £100, and when his debts were so distributed amongst his creditors that he had no one creditor whose debt amounted to £50, and no two whose joint debts amounted to £70, might still be made insolvent if at the time of the act of insolvency he owed £50 and upwards, and before the time mentioned in s. 45 these debts to the amount of £50 or upwards became vested in one person so as to entitle such person to present a petition, though reasonable enough to use, and possibly such as would have weight in a

case of doubtful construction, yet cannot, I think, have any effect on the construction of s. 47 in the face of the judicial decisions which lead up to this section, and the expression of which this section may be considered. And, even if we had not a judicial decision to support the construction that the debt need not at the time of the act of insolvency be due to the petitioner, so long as it was at that time in fact due by the debtor, I think there would be no reason to hold the argument of any weight, as Parliament might reasonably be held to have so intended. S. 46 was passed to secure this: That an estate should not be put to the expense of proceedings of insolvency against the will of the debtor at the request of one creditor unless he had a substantial interest. That interest was fixed at £50; but how he acquired that interest—whether by assignment from one only or several other creditors—could not surely affect his fitness to decide, and the fact that he was the only creditor or the majority of all the creditors (as he would be if the total debts did not exceed £100), would certainly furnish no reason why Parliament should have intended to deprive him of that right which was extended by general words to any creditor of £50 or upwards. There is no difficulty of construction if attention is paid to the object of ss. 46 and 47. If it is borne in mind that, as it seems to me, and I have heard no argument to the contrary, they are intended to establish or fix what is to be the status of creditors at whose request, without the consent of any other creditor or the debtor, the court will place the administration of an estate under the provisions of the Insolvency Act, any other interpretation than that which I have pointed out would not be the natural and ordinary meaning of the words. I do not see that s. 74 can be held to modify, explain, or alter the interpretation to be given to the words "subsisting as well," etc. That section relates to one thing and one thing only. It establishes an arbitrary mode of ascertaining a possible date antecedent to the petition for adjudication to which the insolvency might relate back, but this relation back has in general little effect, except in matters dealt with by the

Insolvency Act, except voluntary conveyances, etc., mentioned in s. 106, and the only effect it has on these (voluntary conveyances) is possibly in some few cases to extend the time during which, as against creditors, they are absolutely void; being void in any event if insolvency occurs within two years of the act of insolvency on which an adjudication is made, and so void without respect to whether or not at the time the person making the settlement was indebted to any person whatsoever. These conveyances are matters dealt with also under the 13th Eliz. c. 5, and the proviso as to relation back, if the debts continue due and not otherwise, is very probably founded on the rule under that Act, that at the time when you seek to set aside such a transaction there must be some debt still due which is in existence, or to defeat which the act or conveyance may have been made (ss. 107 to 109, 111, 112, 140). Full effect may, I think, be given to ss. 111, 112, 113, and 140, whatever may be held to be their meaning, without in any way affecting the true meaning of ss. 30 and 31 and 44 to 47 inclusive. I see nothing in these sections or any other sections of the Insolvency Act which would lead me to give ss. 44 to 47 a different construction than that which they ought to have in light of the English decisions, which is one and the same with that which, to my mind, would be the ordinary and natural meaning of the words apart from any judicial guides. I therefore am of opinion with my brother Chubb that the debt proved in this case is sufficient to support the petition.

Solicitor for petitioner: *P. A. O'Sullivan.*

Solicitor for respondent: *Summerville.*

Re MACKENZIE, INSOLVENT.

Special resolution—Grant of certificate—Insolvency Act of 1874 (38 Vic., No. 5), ss. 5, 93 (7), 167 (2).

Held (Griffith, C.J., dissenting) that a certificate must be granted under s. 167 (2) by the court on the unanimous resolution of a meeting of creditors, none of whom were creditors in respect of debts exceeding £10.

APPLICATION by Margaret Constance Mackenzie for a certificate of discharge under s. 167 (2) of *The Insolvency Act of 1874*.

Jodrell for insolvent.

The facts and argument appear fully in the judgments.

GRIFFITH, C.J.: This application for a certificate is founded upon a resolution of insolvent's creditors, for which it is claimed that it is a special resolution within the meaning of section 167, subsection 2. Such a resolution when properly passed is conclusive, and the court is bound to act upon it and grant the certificate (*Re Coulson*, 6 Q.L.J., 8). It binds all the creditors, including those who are not present, and deprives them of the rights which they would otherwise have against the insolvent and his after acquired property. In all cases where a statutory power is given to a body of persons to affect the rights of others without their consent, it is in my opinion the duty of the court to satisfy itself affirmatively that the power has been properly exercised. Sec. 93, subsec. 7, declares that a special resolution shall be decided by a majority in number and three-fourths in value of the creditors present and voting on the resolution. Two questions therefore arise in my opinion in the case of every resolution alleged to be a special resolution. "Was the resolution decided by a majority in number, and was it decided by three-fourths in value?" and unless both questions are answered in the affirmative the resolution is not a special resolution. Sec. 5 provides that whenever it is necessary to compute a majority of creditors no creditor whose debt does not exceed £10 shall be counted in reckoning a

majority in number. The only mode of applying this rule to the question—"Was the resolution decided by a majority in number?" is, in my opinion, by inquiring how many creditors whose debts exceed £10 voted for and against the resolution. If the former number exceeds the latter, the resolution is decided by a majority in number. If not, it is not so decided. If there is only one such creditor, and he votes in favour of the resolution, there being a sufficient number of other creditors to make a quorum, the necessary majority in number is constituted (*Re Stephensen*, 6 Q.L.J., 32). But if there is no creditor whose vote can be counted I fail to see how there can be a majority. It follows that creditors whose debts do not exceed £10 cannot by themselves confer upon an insolvent a right to obtain a certificate under s. 167. Under ss. 168 and 169 they have by the express words of the sections no voice in the grant of a certificate. It was not necessary to expressly set out in s. 167 (2) the provisions as to the amount of the debts which would entitle the votes of creditors to be counted, because the term "special resolution" of itself imported those provisions. This result, in my opinion, not only gives a consistent interpretation to all the sections relating to certificates, but is the necessary consequence of the plain words of the Act. It was contended that in the case of a unanimous resolution the rule in s. 5 as to counting votes does not apply, because in such a case it is not "necessary to compute a majority." No doubt that would be so at common law. But the power now in question is not a common law power, but a specific statutory power to be exercised by special resolution only—that is, by a resolution decided, in part, by a majority in number of creditors present and voting whose debts exceed £10. It is, therefore, necessary in my opinion to ascertain whether there is such a majority or not. The distinction between the necessity of ascertaining the existence of a majority and the necessity of computing a majority is too fine for my comprehension. The Legislature might, if it thought fit, have provided that a unanimous vote should

have the effect of a special resolution in all cases. But it has certainly not done so in express words. And I have already pointed out that under secs. 168 and 169 the unanimous wish of creditors in respect of debts not exceeding £10 has no statutory effect with regard to a certificate. I do not think the court ought by conjecture to give such an effect to their votes given at a meeting of creditors, or to interpolate the words "unless unanimous" in the definition of a special resolution. To hold that a condition precedent which becomes impossible may be disregarded is of course contrary to the most elementary rules of construction. In the present case the report of the meeting of creditors did not state on its face that the resolution had been decided by a majority in number. On reference to the list of creditors present and voting, it appeared that four creditors only were present, who were unanimous, but that the debt of none of them exceeded £10. I am, therefore, of opinion that the resolution was not a special resolution, and that the certificate should be refused. It was suggested in argument that it had been the uniform practice of the court to grant certificates of discharge upon unanimous resolutions of creditors in respect of debts not exceeding £10. A careful search in the records from the year 1874 to the present time shows that certificates have been granted in five such cases and no more. *Re P. H. Palmer* (Lilley, C.J., 19th February, 1890), *Re R. B. Whitehouse* (Real, J., 12th July, 1893), *Re Calcott* (Harding, J., 4th October, 1893), *Re A. F. Loosmore* (Harding, J., 27th April, 1894), and *Re H. T. Jenkins* (Harding, J., 3rd August, 1894). On reference to the papers I find that in the first three of these cases the report of the meeting, which, under s. 180, is sufficient evidence that the resolutions reported were duly passed, stated that the resolution had been decided by a majority in number and three-fourths in value of the creditors present and voting. There was, therefore, no necessity for the Judge to look further. I find nothing to indicate that in any of these cases the attention of the Judge was directed to the point now under consideration. I cannot,

therefore, regard them as authorities in any way binding this court, although if it appeared that they were the deliberate expressions of the opinions of the learned Judges who granted the certificates, I should hesitate before refusing to follow them, however much I might dissent from their conclusion. The two last cases were decided after a strong opinion had been expressed by one member of this court to a contrary effect. It appears to me, therefore, that the point is now open for decision upon the merits, free from any consideration of the effect that should be given to a supposed current of decisions of single Judges on unopposed applications. I understand that my learned brothers do not agree with my view of the construction of secs. 5 and 98 (7). Assuming then, as I must, that my view is erroneous, I desire to add that if, as I understand my brothers to hold, a special resolution can be passed without the vote of any creditor whose debt exceeds £10, if no such creditor is present, it is my clear opinion that that result can only happen when the resolution is unanimous, so that, apart from the statutory definition, no question of majority would arise at all, and that it cannot be effected by a majority of three-fourths in value opposed to a minority representing less than one fourth. To hold otherwise would be to hold that a statutory condition precedent, which is impossible of fulfilment, may be dispensed with.

HARDING, J.: This is an application by an insolvent for a certificate of discharge under s. 167, subsec. 2, of *The Insolvency Act of 1874*, on the ground "that a special resolution of her creditors has been passed to the effect that her insolvency has arisen from such circumstances as are mentioned in clause 1, and that they desire that a certificate of discharge shall be granted to her." If this is proved, she is entitled to her certificate. The facts are that at a meeting of her creditors, properly convened, a resolution to the above effect was unanimously passed, but there was no creditor present at such meeting whose debt exceeded £10. S. 98, subsec. 7, s. 5, with Rule 78, are all that it is necessary to refer to. S. 98, subsec. 7,

defines the mode in which a special resolution is to be decided, as follows:—"A special resolution shall be decided by a majority in number, and three-fourths in value, of the creditors present personally, or by proxy, at the meeting, and voting on such resolution." S. 5 defines the mode of calculating the majority of creditors thus: "Whenever, under this Act, it shall be necessary to compute a majority of creditors, no creditor whose debt does not exceed £10 shall be counted in reckoning a majority in number, but the debt due to such creditor shall be taken into account in reckoning a majority in value." Rule 78 prescribes that "to constitute a meeting there must be a quorum of at least three, or all the creditors, if their number does not exceed three." The question raised by the facts consequently is, Can a special resolution be passed by a unanimous vote if there is a duly constituted meeting, at which no creditor whose debt exceeds £10 is present? If this question is answered in the negative, a statute, the policy of which is for the benefit of all debtors, must be so construed that some debtors lose the benefit of one of its provisions—namely, s. 167, subsec. 2, under which the application is brought. Now, this should not be its construction, unless the statute speaks out clearly in restriction of its benefits to a particular class of debtors. For example, should this question be answered in the negative, if all an insolvent's creditors present were unanimous, and under £10, he could not have the benefit of this s. (167, subsec. 2), whereas if all, or any, of his creditors were over £10, he could—a manifest incongruity. Now, does the statute speak out so clearly as to necessarily produce this incongruity? If it does not, it should, for the above reasons, if possible, be so construed as not to produce it. It is to be remarked that s. 98, subsec. 7, only applies to creditors present at the meeting, and it is only of such creditors that "a majority in number" is required. Now, if no such creditors are present, a majority of them is not necessary. It is only after it is ascertained that one or more of such creditors are present that the subsection comes into operation, and it becomes

necessary to compute a majority of the creditors, and then "no creditor whose debt does not exceed £10 is to be counted in reckoning the majority in number." Hence it is possible to so construe these sections and the rule, that the answer "Yes" may logically be given to the question proposed, and the suggested incongruous result avoided. Consequently it should be so answered. Certificates have been granted, when the special resolutions were passed at meetings at which no creditors whose debts exceeded £10 were present, by the late Chief Justice Sir Charles Lilley, on the 19th of February, 1890, in *re P. H. Palmer*, by Mr. Justice Real on the 12th July, 1893, in *re R. B. Whitehouse*, and by myself on 4th October, 1893, in *re F. J. Calcott*, and on 27th April, 1894, in *re A. F. Loosemore*, and on 3rd of August, 1894, in *re Jenkins*. Notwithstanding that a diligent search has been made, no decision refusing a certificate under similar circumstances has been found, so that, up to the present, the decisions of this court have been uniform and consistent, and in accordance with the views I have enunciated. I may mention that I still continue of the opinion expressed by me in *Re Stephensen* (6 Q.L.J., 32, at p. 35), and I repeat it as follows:—"I have always been of opinion that, having got the meeting constituted, and the meeting being unanimous, it can do anything. As a Judge of the Full Court, I would decide that, and in my judgment the appeal should be allowed, and the certificate of discharge granted." Consequently, in favour of the view I have taken, there are the decisions of the late Chief Justice Sir Charles Lilley, Mr. Justice Real, myself on more than one occasion, and Mr. Justice Cooper concurring. I think the certificate should be granted. With regard to what has been alleged to be the mode in which certain judges have granted such applications, I entirely disagree. It has been my practice all through my life to give my best work and the best ability which I have got to whatever I have been doing. If I have come to a wrong decision, that decision has been intentional, not as a wrong decision, but in a firm belief in its validity.

There is no mistake about it. I regret exceedingly that my brother judges should rest under any stigma of the kind. I do not accept it myself.

REAL, J.: There is nothing in this Act which expressly declares that the administration of the estate is to be dependent upon the number of creditors present at the meeting whose claims are above £10; and the real question is whether or not the effect of s. 5 is to be held to have been intended by the Legislature to so qualify s. 93 and produce that effect, or only so as to provide the means of ascertaining what proportion of creditors assembled at a meeting can authorise certain things to be done, or a certain course to be adopted, against the will of the other creditors present at the same meeting and voting. To give effect to the former construction would be to alter the whole of the law. S. 5 must be held to qualify s. 93, subsection 7, in this manner. S. 93, subsection 7, provides that a special resolution shall be decided by a majority in number and three-fourths in value of the creditors personally or by proxy at the meeting. Now if s. 5 is to be taken as intended not merely as the mode of ascertaining what amount of dissent, so to speak, will prevent the creditors overruling the opinion of the minority, it must be read as if a further proviso was added, and looking at the whole intention of the Act, it must be so read. Looking at it in that manner, my learned brother came to a conclusion which was not assented to by this court, of which he was one himself. Our rule was intended to read distributively, and inasmuch as that requiring the consent of the majority of the creditors above £10, it was intended to be read not merely as requiring three creditors to be present in every meeting, but at least three creditors of a particular class. The principle upon which that was laid down was afterwards agreed to and assented to by the Chief Justice as applicable to the circumstances of that particular case. And the principle is true. You have to look at the circumstances surrounding the matter. You have to look at the whole of the Act, and you have to see what is the intention of the Legislature. Looking at the whole of the

Act, can you gather from it that the intention of the Legislature was to give rights and privileges and authorities to the creditors of one class of insolvent estates, and deprive the creditors of another class of insolvent estates of those rights and privileges? If you can say that this section would have to be read as if the proviso were added, "and no such resolution shall be passed unless there is present a creditor whose debts exceed £10." Now to test that you have only to put in the words there. It seems absurd to say you cannot have a majority of nothing; but if at the same time that the Legislature required all the creditors present of a particular sort to assent, it said "a special resolution shall be passed by three-fourths in value of the creditors present, and with the vote of all those whose debts exceed £10," that would be the manifest result. You may say you cannot have a majority of nothing; so also you could say: True, but you can have the whole of nothing, and nothing is the whole of nothing. That, to my mind, would not be interpreting. It would be enabling you to say of the Legislature, when they used these words, whether they intended it as a qualification (so to speak) of the persons who may do an act, or as a qualification merely of the number or proportion of those present. If they intended it as a qualification of the person who might do an act, why use the word "majority"? Why not say, "and some of whom shall be present"? Now the question, therefore, to my mind, is which of the two interpretations should be given. If it has to be read as if there were a proviso added to prevent any doubt or dispute, "and only in cases where there are some of such creditors present," then this resolution has not been properly passed. On the other hand, the applicant's right to a certificate is conferred if the special resolution can be passed at a meeting of creditors which does not include among those present any creditor whose debt exceeds £10. If this qualification as regards £10 was limited to a particular Act, as in England, it might be reasonable to say that it was intended to entrust to a particular class of persons the power to do that act and to them only. If, as in

England, the qualification of £10 related only to the persons who were to declare whether liquidation proceedings should be adopted instead of the ordinary course of insolvency, I would have very considerable doubt and difficulty in coming to the conclusion that the Legislature did not intend to give to that class of creditors a privilege which they did not desire to confer on all creditors. But that is not the case here. The qualification here is attached to all special resolutions, and a special resolution is required to authorise many acts in the ordinary course of the administration of insolvent estates. To the creditors in all estates is given the power of appointment of trustee and committee of inspection, but it requires a special resolution to remove a trustee or a member of a committee of inspection. I cannot from an examination of the Act discover or surmise any reason why the right to remove a trustee or a committee of inspection, or to authorise the trustee to act without the authority of the committee of inspection, should be given to creditors where the debts exceed £10 and taken away from creditors where there is no debt proved which exceeds £10; nor why the latter, who, under ordinary circumstances, may be reasonably supposed to be the poorer, should, notwithstanding that they were unanimous, be compelled to spend money in the removal of the trustee, or allow the management of the estate to remain in the hands of persons in whom they have lost confidence. It seems to me unreasonable to put a construction on s. 5 which will operate to deprive creditors of that privilege. For these reasons, and for the reasons given by my brother Harding, I think that s. 5 is not to be read and construed as intended to do more than ascertain what proportion of creditors can do acts in insolvency binding on all the creditors. Now that is the view I take. I think you can give full effect to the whole intention of the Legislature—full effect to s. 5—by holding that that section has only to come into operation where there is a dissent, where there is not unanimity. In that case only when it becomes necessary to compute a majority—and once it becomes necessary to com-

pute it—you must have the two classes of creditors. You must have a number which can be computed and a value which can be computed. Whilst it is unnecessary to compute you have no necessity, number or value. For these reasons I am of opinion that the certificate should be granted.

GRIFFITH, C.J. : The result is that the certificate is granted.

Solicitors : *King & Sachse.*

BROWNE v. COWLEY.

Legislative Assembly—Suspension of member—Standing Orders—Jurisdiction of the Supreme Court.

As the Legislative Assembly has power under its Standing Orders, pursuant to s. 8 of *The Constitution Act of 1867*, to regulate its internal procedure relating to orderly conduct, the Supreme Court has no jurisdiction to take cognisance of the mode in which a resolution for the suspension of a member was passed.

Judgment of Griffith, C.J., (ante p. 234) affirmed.

Bradlaugh v. Gossett, (12 Q.B.D., 271), followed.

APPEAL from a judgment of Griffith, C.J. (ante p. 234).

Lilley, Drake, and Powers for the appellant.

Byrnes, A.G., Power, and Shand for the respondent.

Arguments used were similar to those in the court below.

The judgment of the Court (Harding, Chubb, and Real, JJ.), was delivered by

HARDING, J. : This is an action brought by William Henry Browne, a member of the Legislative Assembly, against its Speaker, claiming damages for expelling him from the Assembly, and preventing him from attending to his duties as such member. The expulsion was, by virtue

of a resolution of the House, arrived at on the 12th of September, 1894, whereby the plaintiff was suspended from the service of the House for one week. The plaintiff alleged that this resolution was *ultra vires* and void, inasmuch as the Standing Orders of the House were not complied with on its passing, and that consequently it afforded no protection to the defendant. The action was tried before the Chief Justice and a jury on the 13th, 14th, and 15th of May, 1895, when the plaintiff was nonsuited. The plaintiff now appeals, and seeks to have the nonsuit set aside, and a new trial ordered on three grounds, the third of which, being the only one necessary to mention, is that the entry of judgment for the defendant was not in accordance with law. The question for this court arising under the above position is, Was the resolution of 12th of September, 1894, a justification of the defendant's conduct, and an answer to the plaintiff's action? The *Constitution Act of 1867*, s. 8, so far as it is necessary to state it, enacts that "The said Legislative Council and Assembly, from time to time hereafter, as there may be occasion, shall prepare and adopt such Standing Rules and Orders as shall appear to the said Council and Assembly respectively best adopted for the orderly conduct of such Council and Assembly respectively all of which Rules and Orders shall, by such Council and Assembly respectively, be laid before the Governor, and, being by him approved, shall become binding and of force." The case of *Barton v. Taylor* (11 App. Cas., 197) establishes that under such a power as this the Legislative Assembly may adopt as its Standing Orders, so far as is applicable to its proceedings, the rules, forms, and usages in force in the British House of Commons, and that such Standing Orders, when assented to by the Governor, shall be valid. The Legislative Assembly, on the 17th of August, 1892, adopted certain Standing Orders, which, on the 22nd of September, 1892, were approved by the Governor. Of these Standing Orders, 385 is as follows:—"In all cases not specially provided for by these Standing Rules and Orders, or by

Sessional or other Orders, resort shall be had to the rules, forms, and usages of the Commons House of Parliament of Great Britain and Ireland, as existing at the date of the passing of these Standing Rules and Orders, which shall be followed and observed, so far as the same can apply to the proceedings of the House," thus giving to the Assembly in cases not provided for by its Standing Orders, the rules, forms, and usages of the Commons House of Parliament, so far as the same apply to the proceedings of the House. The case of *Bradlaugh v. Gossett* (12 Q.B.D., 271) establishes that the House of Commons is not subject to the control of her Majesty's courts in its administration of that part of the statute law which has relation to its internal procedure only, and that what is said or done within its walls cannot be inquired into in a court of law, and that although a resolution of the House of Commons cannot change the law of the land, yet a court of law has no right to inquire into the propriety of a resolution of the House restraining a member from doing within the walls of the House itself, something which, by the general law of the land, he had a right to do. The case further established that an action would not lie against the Sergeant-at-Arms of the House of Commons for excluding a member from the House in obedience to a resolution of the House directing him to do so; and that the court would not grant an injunction to restrain that officer from using necessary force to carry out the order of the House. The complaint in *Bradlaugh v. Gossett* was that, having been elected and returned member for the borough of Northampton, he had not been allowed to take the oath required by the Parliamentary Oaths Act, and that, by a resolution of the House, the Sergeant-at-Arms had been ordered "to exclude Mr. Bradlaugh from the House, until he shall engage no further to disturb the proceedings of the House." The disturbance in question arose from the attempt of Mr. Bradlaugh to take the oath which the law required him to take, and which a resolution of the House prevented him from taking.

The plaintiff asked the court to declare the order of the House to be void, and to restrain the Sergeant-at-Arms from carrying it into effect. The law on the subject was stated on page 280 by Stephen, J., thus: "In order to raise the question now before us, it is necessary to assume that the House of Commons has come to a resolution inconsistent with the Act; for, if the resolution and the Act are not inconsistent, the plaintiff has obviously no grievance. We must, of course, face this supposition, and give our decision on the hypothesis of its truth. But it would be indecent and improper to make the further supposition that the House of Commons deliberately and intentionally defies and breaks the statute law. The more decent, and, I may add, the more natural and probable supposition is that, for reasons which are not before us, and of which we are therefore unable to judge, the House of Commons considers that there is no inconsistency between the Act and the resolution. They may think there is some implied exception to the Act. They may think that what the plaintiff proposes to do is not in compliance with its directions. With this we have nothing to do. Whatever may be the reasons of the House of Commons for their conduct, it would be impossible for us to do justice, without hearing and considering those reasons; but it would be equally impossible for the House, with any regard for its own dignity and independence, to suffer its reasons to be laid before us for that purpose, or to accept our interpretation of the law in preference to its own. It seems to follow that the House of Commons has the exclusive power of interpreting the statute, so far as the regulation of its own proceedings within its own walls is concerned; and that, even if that interpretation should be erroneous, this court has no power to interfere with it directly or indirectly." Thus it is clear that the House has the exclusive right to regulate its own internal concerns, and that short of a criminal offence committed within the House, or by its order, no court will take cognisance of that which passes within its walls. An inspection of the Standing Orders shows that the Assembly had,

under their Standing Orders, the power to pass such a resolution as it passed in this case. It is enough to refer to Standing Order 166, and the Standing Order of the House of Commons, 21, as the Assembly may either rightfully or wrongfully have held that either or both of the Standing Orders applied to the present proceedings. Standing Order 166 gives the power to suspend from the service of the House "for such period as the House may think fit." Standing Order 21 limits the suspension on the first occasion to a week. The suspension in this case is for a week only, and is within both Standing Orders. The Votes and Proceedings of the sitting of the 12th September, 1894, were put in at the trial and marked exhibit 2. They show that "disorder arising" Mr. Browne was named, and that it was consequent thereon that the resolution in this case was passed. This is also spoken to in the plaintiff's evidence at folio 12 of the Chief Justice's notes. This power being shown to exist, it is not necessary or possible for this court to take cognisance of the mode in which it was passed within the walls of the Assembly, and it will not do so, because, under Standing Order 335, so much of this privilege of regulating its internal concerns as related to orderly conduct under section 8 of *The Constitution Act of 1867* are part of the Standing Orders of the Assembly. The appeal is dismissed with costs.

Solicitors for appellant: *J. N. Robinson & Co.*

Solicitors for respondent: *Macpherson & Fee.*

MUNICIPALITY OF ROCKHAMPTON v. INGHAM.

Contract—Impossible condition—Rateable land—Exemption from rates—Land vested in Local Authority—Local Government Act of 1878, s. 76—Valuation and Rating Act of 1890 (54 Vic., No. 24), s. 11.

An action will not lie on a covenant to pay money upon a condition, the performance of which is legally impossible.

The Municipality of R. being the registered proprietors of certain land, demised it to the defendant for 21 years at a fixed rent. The lease contained, *inter alia*, a covenant in these words: "The said demised premises shall be liable to be rated and assessed in the same manner as if the said premises were not the property of the said municipality."

The municipality sued the defendant for rates.

Held that the land was "vested in the municipality" within the meaning of s. 176 of *The Local Government Act of 1878*, and s. 11 of *The Valuation and Rating Act of 1890*, notwithstanding that it was in the possession of the defendant.

The exemptions from rating contained in those Acts are not conditions for the benefit of individuals, but limitations of the statutory authority of the Local Authority. Such authority cannot be conferred by agreement *inter partes*.

Held further, that reading the covenant as a covenant to pay a sum to be assessed in the form of rates in respect of the property, the provisions of the Local Government Acts allowing an appeal from assessments to legal tribunals could not be applied to land not rateable under the Acts, and that, the conditions of assessment being consequently impossible of complete fulfilment, the covenant was invalid.

APPEAL from so much of an order of Harding, J., under O. XIV, r. 1, as gave leave to sign Final Judgment against the defendant for £82 10s., claimed by the plaintiffs as rates due under implied covenants contained in leases executed by the defendant under the Real Property Acts.

Fee: and Shand for appellant.

Lilley for respondents.

The facts and argument appear fully in the judgment of the court (Griffith, C.J., Chubb and Real, JJ.), which was delivered by

GRIFFITH, C.J.: This is an appeal from an order of Harding, J., upon an application for final judgment under O. XIV, r. 1. The writ is indorsed with a claim for rent and rates due under covenants implied in leases under the Real Property Acts. The amount in question on this appeal is a sum of £82 10s. claimed as rates. The facts are not in dispute. The plaintiffs being the registered proprietors under the Real Property Acts of the lands in respect of which the rates are alleged to be due, demised them to the defendant for terms of twenty-one years at fixed rents. The leases, which were executed by the defendant, were

expressed to be made subject to certain covenants, conditions, and restrictions, one of which is in these words: "The said demised premises shall be liable to be rated and assessed in the same manner as if the said premises were not the property of the said municipality." The defendant contends that this condition or covenant is illegal, or at any rate ineffectual, and imposes no obligation on him. Harding, J., allowed final judgment to be signed for the amount in question. The plaintiffs contend that although they are registered proprietors of the land, it is not vested in them within the meaning of s. 176 of *The Local Government Act of 1878*, which was in force when the leases were made, or of s. 5 of *The Valuation Act of 1887*, or of s. 11 of *The Valuation and Rating Act of 1890*, inasmuch as it is in the beneficial occupation of the defendant for a term of years, and their estate is an estate in reversion only. The language of these sections, so far as regards the matter now in question, is substantially identical. That of the Act of 1878 is: "All land shall be rateable property within the meaning of this Act, save as is next hereinafter excepted, that is to say (*inter alia*), land vested in or in the occupation of or held in trust for the municipality or the council thereof." That of the Acts of 1887 and 1890 is: "All land is rateable for the purposes of this Act with the following exceptions only, that is to say (*inter alia*), land vested in or in the occupation of or held in trust for the local authority." The definition draws a plain distinction between land vested in the local authority and land in their occupation. We think that the word "vested" is used in a popular sense, and is intended to denote land of which the local authority is owner in fee, or for any lesser estate, whether their title arises from a deed of grant or any other instrument by which an estate in land can be lawfully vested in them. And we think it is none the less vested in them because they have granted a lease of it. It follows that the land was not, and is not, rateable land under the Local Government Acts. The Valuation and Rating Act contains, as did the earlier Acts, the provisions of which are re-enacted

in it with amendments, elaborate provisions for assessing, making, and enforcing rates. These include provision for valuation, for notice of the valuation to persons liable to pay the rates, for appeals by aggrieved persons to justices, with a final appeal to this court on questions of law, and for enforcing the rates by distress. The local authority is required to keep account of the rates collected, and is entitled to an endowment from the consolidated revenue, the amount of which is dependent on the amount of rates actually collected. We think that these provisions exclude the notion that the exceptions from rateability are in the nature of an exception introduced in a statute in favour of individuals, and the benefit of which may be waived by the persons for whose benefit it was enacted. The power of the local authority to make and collect rates on land within its local jurisdiction is purely statutory. As to land which is not included in the power, but falls within the exception, they have no statutory power at all relating to rates. This being so, we have no doubt that a covenant by parties cannot have the effect of making that rateable which by law is not rateable. The covenant in question cannot, therefore, have literal effect given to it, and the money sought to be recovered cannot be recovered as rates. No objection was, however, taken to the form of the indorsement on the writ. It was further contended for the plaintiffs that even if literal effect cannot be given to the covenant, it is susceptible of an interpretation that will give effect to the substantial intention of the parties which, it was said, was that the lessee should, in addition to his fixed rent, pay by way of rent or return to the lessors a further sum, which should be of equal amount to that which would be payable as rates if the land had been rateable. It is not unlikely that this was the intention of the parties, if they really applied their minds to the question from that point of view. For the defendant it was urged that the covenant is illegal — *i.e.*, contrary to law, because if it took effect according to its terms, the plaintiff's income from rates would be apparently swelled by the amount paid

as rates in respect of their own property, by which means they would be entitled to claim a larger endowment than they were really entitled to, and that this would be a fraud on the public. No doubt this result would follow if moneys received by the plaintiffs from the defendant under the covenants were included in the verified account sent to the Treasurer upon which the amount of endowment is calculated. But it is not necessary to impute to the plaintiffs an intention to do this, or to do otherwise than to exclude the moneys so collected from their verified account. "If words have a double intendment, and the one standeth with the law and the other is against the law, they are to be taken in a sense which is agreeable to law." (*Shep. Touch.* 80, and per Martin, B., in *Fussell v. Daniel*, 10 Ex. 597.) This doctrine may be applied, we think, as well in considering the lawfulness or unlawfulness of a contract, as in considering its verbal construction. Moreover, even if an unlawful intention can be imputed to a municipal council as distinguished from an attempt to do an act which is *ultra vires*, the question of intention would be one of fact. The defendant further contended that the covenant if not unlawful, was inoperative. Assuming that the court ought, under the circumstances, to endeavour to construe it so as to give it some effect, we think it could not be put more favourably for the plaintiffs than as a covenant to pay, by way of additional rent, a sum of money to be assessed in the same manner, by the same persons, and subject to the same conditions, as are applicable to the assessment of rates. A covenant in those terms would import all the provisions of the Acts in force for the time being relating to the assessment of rates, including the right of appeal to justices and to this court. And the assessment of the amount in accordance with those conditions would be a condition precedent to the obligation to pay it. Such a condition would, however, be impossible of fulfilment; for the agreement of the parties would not confer jurisdiction on the justices or on this court to entertain an appeal from the valuation (*Farguharson v.*

Morgan, 1894, 1 Q.B. 552), even if it could import the provisions as to valuation by a statutory or official authority. "If the condition be impossible no state or interest shall grow thereupon" (*Co. Litt.*, 206 A.C.). We think that when the matter of an agreement is legally impossible, which both parties are presumed in law to know, no valid contract can arise from such agreement (*Leake on Contracts*, 687). And we think that the doctrine of waiver does not apply to conditions impossible of performance. It was contended, however, by the learned counsel for the plaintiffs that the parties intended to import only such of the provisions of the valuation and rating laws as could by law be imported. There is nothing on the face of the instrument to suggest any such limited intention. It is, on the contrary, highly improbable that the lessee intended to bind himself to pay upon any valuation, however excessive, that might be put upon the land, and to forego all right of appeal. If we were to impose such a limit, we should be making a contract for the parties, and not construing the one which they have made for themselves. We think, therefore, that no legal effect can be given to the covenant in question, and that the defendant is entitled to succeed on this appeal. It was agreed that this application should be taken as the hearing of the action. The order of the court will, therefore, be to vary the decision below by reducing the judgment for the plaintiffs by £82 10s., and entering judgment for the defendant in respect of that part of the plaintiffs' claim. The defendant should have the costs of the appeal.

Solicitor for appellant: *J. F. Fitzgerald*.

Solicitors for respondents: *Rees R. & Sydney Jones*.

IN CHAMBERS.

GRIFFITH, C.J.

21st September, 1894.

Re WALKER'S WILL.

Passing accounts—Executor's commission—Gross and net receipts.

Commission will be allowed to an executor properly carrying on a business on the net and not on the gross amount of his receipts from the business.

APPLICATION to pass executor's accounts and for a commission on his receipts.

In this case J. T. Walker, the executor of the will of Thomas Walker, deceased, applied to pass his accounts as executor from the 28rd February, 1893, to the 28rd February, 1894, and for a commission on £5,008 13s. 2d., his receipts in the estate.

The accounts were accounts of a station property mortgaged to the testator, and of which the executor was in possession as mortgagee. The £5,008 13s. 2d. was the amount of the gross receipts from the property, the net receipts being only £1,193 13s. 4d.

Jodrell, for the applicant, asked for an order passing the accounts, and allowing commission to the executor on his gross receipts.

GRIFFITH, C.J.: I do not think I can treat the gross receipts as income of the testator's estate. The net receipts from the station are £1,193 13s. 4d., and I will allow commission on that amount only.

Solicitors for applicant: *Rüthning & Jensen*.

IN CHAMBERS.

GRIFFITH, C.J.

19th April, 1895.

Re WATSON, INSOLVENT.

Petitioning creditor's costs—Insolvency Act of 1874, ss. 67, 202 (12), rr. 200, 201, 226.

A creditor making application for an order of adjudication under r. 200 of *The Insolvency Act of 1874*, or for an order under r. 201, to proceed with the insolvency, is, as regards his right to costs out of the estate, a petitioning creditor within the meaning of s. 67 of that Act.

APPLICATION by trustee and creditors of estate for an order that the costs of the adjudication of insolvent and of the order to proceed with the insolvency should be taxed and paid out of the estate of the insolvent.

The insolvent had filed a petition under ss. 202 and 204, but before the meeting of creditors an order had been made under r. 200, on the debtor's application, adjudicating him insolvent, but staying proceedings until after the meeting. No resolution having been passed at the meeting, an order was made under r. 201 on the application of the present applicant, directing the insolvency to be proceeded with. The taxing officer had refused to tax the costs of these proceedings as petitioning creditor's costs without an order of the court.

Robinson, for the applicants, submitted that the costs were petitioning creditor's costs, and should be taxed and paid out of the estate.

GRIFFITH, C.J.: I think that r. 201 provides an alternative form of proceeding for adjudication, more summary than that under s. 202 (12). I am disposed to think, therefore, that a creditor who makes application under r. 201 for adjudication, or for an order to proceed with the insolvency, is a petitioning creditor within the meaning of s. 67. I think also that the adjudication was part of the proceedings for liquidation within r. 226, and that the costs are payable under that rule. The taxing officer must tax the costs.

Solicitors for the applicants and the trustee: *J. N. Robinson & Co.*

IN CHAMBERS.

GRIFFITH, C.J.

27th May, 1895.

Re KEENAN'S LANDS AND GOODS.

Passing accounts — Breach of trust — Duty of Registrar.

The Registrar's duty on passing executor's accounts does not include consideration of the question whether an amount admitted by the executor to have been received, was received in consequence of a breach of trust. But he may report the facts specially.

APPLICATION to pass administrator's accounts.

On the application of the Queensland Trustees to pass their accounts as administrators of the lands and goods of W. J. Keenan, deceased, it appeared that the sum of £706, part of the estate, had been at deposit in the Queensland National Bank, and that the time of repayment had, by the bank's reconstruction scheme, been postponed for some years. The administrators had sold this deposit at 15s. in the £. Some of the next of kin were of age and had consented to the sale, but others were under age. The Deputy-Registrar refused to pass the item representing the purchase-money on the ground that the sale was a breach of trust. The matter was referred to the judge.

Chambers for the administrators.

GRIFFITH, C.J.: I am of opinion that the question whether the sale of the deposit was a breach of trust is not one for the consideration of the Registrar upon the passing of the accounts, but I think that it would be proper for him, if he thinks fit, to report the facts specially in his certificate.

Solicitors for the applicants: *Chambers, Bruce & McNab.*

GRIFFITH, C.J.

29th May, 1895.

In re M'COLLIM'S TRUSTS.

Vesting order—Section 29 of Trustees and Incapacitated Persons Act of 1867—Entitling of documents in application.

Held that an application for the transfer of stock of a lunatic trustee or mortgagee under s. 29 of *Trustees and Incapacitated Persons Act of 1867* need not be entitled in the matter of the lunatic.

APPLICATION by petition under s. 29 of *Trustees and Incapacitated Persons Act of 1867*, to vest the rights and interest of James Rowe Newman-Wilson, a person of unsound mind, and other persons, in petitioner, C. E. M'Collim.

W. F. Wilson appeared to support the petition, which was entitled in the matter of *The Trustees*

and *Incapacitated Persons Act of 1867* and in the matter of the trusts, but not in the matter of the lunatic. He submitted that the petition need not be entitled in the matter of the lunatic, and cited *In re Sparrow* (L.R. 5 Ch., 662), *Re Watson* (19 Ch.D., 384), and *Re Gardner* (10 Ch.D., 29).

GRIFFITH, C.J.: I do not think it necessary to entitle the petition in the matter of the lunatic.

Solicitors for petitioner: *W. H. Wilson & Hemming*.

IN CHAMBERS.

GRIFFITH, C.J. 10th July, 1895.

Re A. R. JONES' WILL.

Will—Revocation—Cancelling.

Some time after the execution of a will the words "Cancelled in consequence of having given my wife the bulk of my property," were written on one page of the will, and signed by the testator.

Held, that this was not a revocation of the will.

APPLICATION by the executors named in a will of A. R. Jones, deceased, dated 31st March, 1895, for probate of that will.

Referred by the Registrar to the Judge in Chambers.

The will of which probate was sought was dated 31st March, 1895, and was duly executed. On the second page the following words were written:—"10 November, 1894. Cancelled in consequence of having given my wife the bulk of my property." This writing was signed by the testator.

Reere, for the executors, asked for probate of the will in its entirety.

GRIFFITH, C.J.: The case is governed by *Cheese v. Lovejoy* (2 P.D., 251) and *Stephens v. Taprell* (2 Curt., 458). Probate should therefore go.

Solicitors for appellants: *Rees R. & Sydney Jones*.

CHARTERS TOWERS CRIMINAL SITTINGS.

CHUBB, J.

15th May, 1895.

REGINA v. ROSS.

Criminal law—Murder—Practice—Statement of prisoner read to jury.

A prisoner was allowed to read a statement to the jury after his counsel's address, and the Crown prosecutor was allowed a reply on the new matter.

Regina v. Shimmin (15 Cox, 122), followed.

At the Circuit Court, Charters Towers, held before Chubb, J., in May, 1895, George Ross was tried for the murder of his wife, Annie Ross. At the close of the case for the Crown, Macnaughton, for the prisoner, announced that he did not intend to call witnesses, but asked the court to allow a written statement, signed by the prisoner, to be read to the jury before he addressed them on his behalf.

CHUBB, J.: The prisoner is now, by *The Criminal Law Amendment Act, 1892*, a competent witness on his own behalf. Why cannot he give this statement on oath?

Macnaughton: He is in such a state of nervous anxiety that I do not think he is physically able to give evidence. In *Regina v. Blacks*, 1880, Bowen, J., on a trial for murder allowed this course. In *Regina v. Doherty* (16 Cox, 806), Stephen, J., did the same, subject to the right of the prosecution to reply.

CHUBB, J.: In *Regina v. Milehouse* (15 Cox, 622) Lord Coleridge, C.J., says that it may be done after his counsel has addressed the jury, and that this was resolved by the majority of the judges, in which he did not agree. The question was considered at a meeting of all the judges liable to try prisoners, held in November, 1881, and adjourned for further consideration. After this meeting, Cave, J., in *Regina v. Shimmin* (15 Cox, 122), allowed the prisoner himself to give his own version of the facts after his counsel had addressed the jury, subject to a right of reply by the prosecution on the new matter, and his Lordship said that this was the rule of practice intended to be followed in future. Now that the prisoner is a

competent witness for himself, ought the practice to be continued? I do not know of any settled rule in this court one way or the other. For the present, therefore, I will follow *Regina v. Shimmin*, and allow the statement to be read after you have addressed the jury.

Macnaughton then addressed the jury, after which the prisoner's statement was read by his counsel and handed to the associate.

Jameson replied for the Crown.

The prisoner was convicted of manslaughter.

AUGUST SITTINGS OF THE FULL COURT.

MAGILL v. BANK OF NORTH QUEENSLAND.

Action on dishonoured cheque by non-trader—Damages—Post-dated cheque—Banker and customer—Banker's right of set-off—Pass books—Bills of Exchange Act of 1884 (48 Vic., No. 10) ss. 3, 4, 11, 12, 13, 14 and 74.

Action for dishonour of two cheques. Plaintiff, a solicitor's clerk who had a banking account with defendants, issued to a creditor a post-dated cheque, which was put in circulation by the creditor and received in the ordinary course of banking exchange by defendants, who paid it and debited it to plaintiff's account before the date appearing on the face of the cheque. In consequence of this debit two other cheques drawn by plaintiff were dishonoured.

Held by Griffith, C.J., and Real, J., that the true date of a post-dated cheque issued by the drawer is the date of its issue. Held also that defendants, who received the cheque in question from *bona fide* holders for value, were themselves holders for value, and that the amount of the cheque was properly debited to plaintiff's account before the date appearing on its face.

By *Harding, J.*: Without deciding whether a post-dated cheque is a cheque payable on demand or a bill of exchange payable at a future day, i.e., on the date appearing on its face, that defendants were in either view entitled to debit the amount to plaintiff's account.

Per Griffith, C.J., and Real, J.: Any person who ordinarily transacts his pecuniary business by means of cheques on a bank can maintain an action for substantial damages for dishonour without proof of special damage.

It appeared from plaintiff's own evidence that before drawing the second cheque, the dishonour of which was complained of, he had, on being informed of the dishonour of the first, obtained from defendants his pass book, which showed that the post-dated cheque had been debited to his account, and that the balance to his credit was insufficient to meet the cheque which he then proceeded to draw. It appeared also that he knew that he would not be allowed to overdraw his account.

Per Griffith, C.J., and Real, J.: An action could not be maintained for the dishonour of a cheque drawn under such circumstances, both on the ground of estoppel and on the ground of a suspension by express notice of the implied term of the contract between banker and customer on which the action was based.

Per Harding, J.: It was for the jury to say whether the admitted facts would have that effect.

Motion to set aside a judgment of *Cooper, J.*, directing judgment to be entered (in accordance with the finding of a jury) for the plaintiff for £60 and his costs of action.

Byrnes, A.G., and Mansfield for the appellants.

Feez for the respondent.

The facts appear in the judgments of the learned judges.

During the argument the following authorities were cited by the learned judges and counsel:—

Marzetti v. Williams (1 B. & Ad., 415), *Rolin v. Steward* (28 L.J., C.P., 148), *Larios v. Bonany* (L.R. 5 P.C., 846, 857), *Prehn v. Royal Bank of Liverpool* (L.R. 5 Ex., 92), *Milrain v. Bank of New South Wales* (10 V.L.R. (L.), 8), *Stewart v. Bank of Australasia* (9 V.L.R. (L.), 240), *The Stamp Act of 1894* (ss. 36, 41), *Bills of Exchange Act of 1884* (s. 74), *Kymer v. Laurie* (18 L.J. (Q.B.), 218), *Watson v. Poulsen* (15 Jur. 1011), *Meyer, Morris & Co. v. London and Westminster Banking Co.* (1 Times L.R., 860; *Cab. & Fl.* 498), *Beran on Negligence*, p. 866, note 5; *Walker on Banking* (pp. 144 and 112), *Carew v. Duckworth* (L.R. 4 Ex., 818), *Macdonald v. Tully* (1 Q.L.J., Sup. 21), 3 *Ruling Cases* (261), *Annual Practice* (1081, 2), *Grant* (197-8), *Sneyd v. Williams* (9 L.T.N.S., 115), *Pfeiffer v. Midland Railway Co.* (18 Q.B.D., 248), *Doria v. Bank of Victoria* (5 V.L.R. (L.), 898), *Morse on Banking* (ss. 458, 290-1, 456, 889A),

Hall v. Fuller (5 B. & C., 750), *Scholey v. Ramsbotham* (2 Camp., 485), *Ilobarts v. Tucker* (20 L.J. (Q.B.), 270), *Foster v. Mackreth* (L.R. 2 Ex. 168), *Gatty v. Fry* (2 Ex. D., 265), *Royal Bank of Scotland v. Tottenham* (1894, 2 Q.B., 715), *Mohawk Bank v. Broderick* (27 Am. Dec., 192), *Crawford v. Westside Bank* (58 Amer., R. 152), *Re Palmer* (19 Ch.D., 409), *Currie v. Misa* (1 App. Cas., 554 and 564), *Da Silva v. Fuller* (7 M. & W. 178n), *Morley v. Culverwell* (Ib.), *Williams v. Union Bank of Australia* (5 Q.L.J., 99, 109, 110), *O'Connor v. Sheriff of Queensland* (4 Q.L.J., 218), *The Tasmania* (15 App. Cas., 228), *Bank of New South Wales v. O'Connor* (14 App. Cas., 281) 2 *Macleod on Banking* (514, par. 91), *Wheeler v. Gill* (82 Amer. Dec., 231-235), *Allen v. Keeses* (1 East., 485), *Storey on Bills* (s. 490), *Garnett v. McKewan* (L.R. 8 Ex., 10).

GRIFFITH, C.J.: The plaintiff sued the defendants, who were his bankers, for damages for the dishonour of two cheques—one for £2 10s., dishonoured on 26th March; and the other for £1 14s. 10d., dishonoured the 1st April. The defendants paid £10 into court, which was more than enough to cover nominal damages, but denied that at the time when the cheques were dishonoured they had sufficient money of the plaintiff's in their hands applicable to the payment of them. The plaintiff is a solicitor's clerk, and the defendants contend that he cannot in any event recover more than nominal damages, not being a trader. The cause of action against a banker for dishonour of a cheque is for a breach of the contract which is implied from the relation of banker and customer, that the banker will, to the extent of the moneys of the customer in his hands and available for the purpose, honour any cheques that may be presented to him for payment (*Marzetti v. Williams*, 1 B. & Ad., 415). The measure of damages for a breach of such a contract depends on the same principle as in other cases of breach of contract—that is, the damages are such as may fairly and reasonably be considered as arising, according to the usual course of things, from such a breach of contract, or such as may reasonably be supposed

to have been in the contemplation of both parties when they made the contract, as the probable result of the breach of it (*Hadley v. Barendale*, 9 Ex., 341). To a person who conducts his ordinary pecuniary transactions by means of cheques on a bank, the natural consequence of the dishonour of his cheques is that his credit will be injured. This appears to be equally a natural consequence whether he is a trader or not. It follows that the plaintiff, who was shown to be such a person, might recover more than nominal damages if the jury thought fit to award them, if the dishonour of the cheques was a breach of contract. No case in the English courts was cited to us in which a person not a trader had recovered more than nominal damages. On the other hand no case was cited deciding that such a person cannot recover more than nominal damages, except the case of *Milvain v. Bank of New South Wales* (10 V.L.R. (L), 8), which was decided by Stawell, C.J., and Holroyd, J., in 1884. With great respect to those learned judges, they do not appear to have given sufficient weight to the consideration that the injury to credit arises not from the circumstance that the customer is a trader, but from the fact that he is a person who conducts his ordinary pecuniary business by means of cheques. The use of cheques and the keeping of banking accounts is much more generally spread amongst all classes of the community in Australia than it was in England in 1854, when the case of *Rolin v. Steward* (14 C.B., 595, 23 L.J.C.P., 148), in which the judges spoke only of the case of traders, was decided. The defendants not being therefore entitled on this ground to have the damages reduced below the amount paid into court, it becomes necessary to consider whether the plaintiff had any cause of action in respect of the dishonour of both or either of the cheques. The material facts on this point are briefly these: On the 15th of March, plaintiff issued to a creditor of his a cheque for £2 18s., dated the 6th of April. On the 19th of March this cheque was presented in ordinary course through the Queensland National Bank to defendants, who allowed it in account

with that bank and debited it to plaintiff's account in their ledger. The result was that a balance of 15s. 5d. only remained to plaintiff's credit. On the 26th of March, the cheque of £2 10s. was presented for payment and dishonoured. On the 30th of March, plaintiff having been informed of this dishonour, applied to defendants for his pass book, which was given to him on the same day, and which showed a credit balance of 15s. 5d. only. On the 1st of April he paid 12s. to his credit, which with the 15s. 5d. would make a total of 27s. 5d.; and on the same day, without any further communication with the defendants, although he knew, he says, that he would not be allowed to overdraw, he drew the cheque for £1 14s. 10d., which was also on the same day presented for payment and dishonoured. It appears, therefore, that if the post-dated cheque for £2 18s. had not been debited to plaintiff's account, he would have had sufficient money to his credit to meet both the cheques which were dishonoured, but that before he drew the second of those cheques he had been informed by defendants, at his own request, that according to their books the money at his credit was not sufficient to meet it. If the cheque for £2 18s. was rightly paid on presentment, or if the amount of it was properly debited to plaintiff's account on 19th March, the defendants committed no breach of contract, and the action fails entirely as to both causes of action. It is necessary, therefore, to consider the legal effect of a post-dated cheque, and the rights and liabilities created by such an instrument. These now depend on *The Bills of Exchange Act of 1884*. The principle to be applied in dealing with that Act is thus stated by Lord Herschell in *Bank of England v. Vagliano* (1891, A.C., at pp. 144-5): "The Act . . . was intended to be a code of the law relating to negotiable instruments. I think the proper course is, in the first instance, to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then,

assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view." Turning, then, to the Act, we find that a cheque is defined as "a bill of exchange drawn on a banker, payable on demand" (s. 74), and the provisions of the Act relating to bills of exchange apply to cheques, except where otherwise provided (*Id.*). A bill of exchange is defined by s. 4 as "an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer." A bill is payable on demand if it is expressed to be payable on demand, or at sight, or on presentation, or if no time for payment is expressed. (S. 11). A bill is payable at a determinable future time if it is expressed to be payable at a fixed period after date or sight, or after the happening of a future but certain event. (S. 12). By s. 13, if a bill "expressed to be payable at a fixed period after date" is issued undated, the holder may fill in the true date of issue. S. 14 provides that when a bill is dated the date is, unless the contrary is proved, to be deemed the true date of the drawing of the bill, and that a bill is not invalid by reason only that it is ante-dated, or post-dated, or dated on a Sunday.

It plainly follows from these provisions that the date appearing on a bill is not necessarily its true date; that an erroneous statement of the date does not affect the validity of the bill; that the true date, if material, may be shown; and that the "fixed period after date" at which a bill is payable means some day subsequent to the day mentioned at the top of the bill, as that on which the bill is drawn. If, then, a bill is a valid bill although ante-dated, or post-dated, or undated, it must have that quality as soon as it becomes a bill—that is, when it is "issued;" which means (s. 3) when it is first delivered complete in form to a person who takes it as holder. It is settled

by the cases of *Ex parte Richdale* (19 Ch. Div., 409), and *Royal Bank of Scotland v. Tottenham* (1894, 2 Q.B., 715)—one decided before, and one after the passing of the English Bills of Exchange Act (with which, for the present purpose, the Queensland Act is identical)—that a banker into whose hands a post-dated cheque comes in the course of business, and which he allows in account with the person from whom he receives it, is a holder for valuable consideration. The holder of what? Plainly of a valid bill, which it cannot be unless it has been lawfully issued. Now a valid bill must in law have some date. Its validity is not affected by the wrong date being written upon it, or by its having no date so written. By holding that the true date of a bill is the date of its "issue" as defined by the Act, all these provisions are reconciled. And I think that this is the necessary construction of the provisions of the Act to which reference has been made. The true date of the bill or cheque in question was therefore the day when it was issued by plaintiff—i.e., the 15th of March. It was then a negotiable instrument, the negotiability of which could not be affected by any act of the drawer. If this is so, it appears that it was then a bill payable on demand, and the defendants were justified in paying it when presented on 19th March, and that they were at liberty to prove that its true date was antecedent to that day.

If it is said that post-dated cheques are well-known instruments, and that this construction practically does away with them, I say that is not so. A man may well draw a cheque, dating it as of a future day, intending that it shall not be issued till that day. If it comes into the hands of any person before that day, he has notice on the face of the cheque that it is a document which is apparently not in circulation as a negotiable instrument, and if he takes it as such he does so at the risk of its being afterwards found that the person from whom he received it had no right to it. But if it turns out that that person had a good title to it as a valid negotiable instrument, the risk proves to have been nothing. The

English case of *Da Silva v. Fuller*, and the American decisions cited to the court as to the effect of a post-dated cheque, go no further than this. It is said that according to the *law merchant*, which is preserved by s. 99 of the Bills of Exchange Act, a post-dated cheque imports a direction to the banker not to honour it before the date expressed on the face of the cheque. Bankers probably act on that view. But I do not see how such a direction can have any more effect than an express direction to a banker not to honour a cheque which bears the true date of issue. Such a cheque would nevertheless be a perfect negotiable instrument, and if the banker became a holder of it for valuable consideration, as the defendants admittedly did in this case, he could, I think, set it off against his customer's balance in his hands (*Garnett v. McHewan*, L.R. 8 Ex., 10). For these reasons I think that the cheque for £2 18s. was properly debited to the plaintiff's account on 19th of March, and that the dishonour of the cheques in question was not in either case a breach of contract. This conclusion is not inconsistent with the actual decisions in any of the English cases cited, although it may be inconsistent with some incidental observations of learned judges. The case of *Foster v. Mackreth* (L.R. 2 Ex., 169), which was before the Bills of Exchange Act, and is, therefore, no longer binding, turned upon the authority of a partner in a firm of solicitors to bind the partnership by a negotiable instrument not intended to be paid until a future period. The conclusion has the further advantage that a man who attempts to evade the provisions of the Stamp Act by giving a post-dated cheque with a penny stamp, instead of giving a bill of exchange payable at a future day and bearing a shilling stamp, cannot maintain an action of breach of contract against his banker founded on their acting on the assumption that he did not attempt to do so. With regard to the cheque for £1 14s. 10d., I desire to add that in my opinion the plaintiff could not in any case support the verdict so far as it depends on the dishonour of that cheque, and that for two

reasons: (1) The implied contract to honour a customer's cheques to the extent of the funds available is determined by express notice to the customer before a cheque is drawn that according to the banker's books there are not sufficient funds available for its payment; and (2) a man who deals with another, knowing that that other believes, although erroneously, in the existence of a certain state of facts, cannot, without correcting the error, be heard to say that the actual state of facts was different.

HARDING, J.: I propose expressing my opinion on this case in so much as the judgment which has been delivered by the Chief Justice contains some things which I do not agree with, and other parts of it I find entirely unnecessary to decide, for the purpose of this action. As the case was left by the Attorney-General, he (the Attorney-General) said it was enough for him to leave the case without a definition of what exhibit 4, the post-dated cheque, is—whether it is a bill of exchange, payable on demand; or whether it is a bill of exchange, payable at the date of the cheque. But taking either of those views he is bound to succeed. That being so, I consider that it not being necessary for the decision of this case to decide which it is, any decision given by this court will on future occasions be nothing but *obiter dicta*. I never lend myself to that. I decide every case as it comes up, and endeavour, so far as I can, not to allow myself, or counsel arguing before me, to be embarrassed by some statement of the law which was not necessary to the decision of the case. That being so, I proceed to give my reasons in the case. The facts are sufficiently known. The exhibit No. 4 was a cheque drawn by Magill on the Bank of North Queensland for £2 18s., and was dated 6th April. That cheque got into the hands of Magill's bankers. Now, if that was a bill of exchange payable on demand, when it was presented at the bank, if the bank had assets in hand, they were right in paying it; and having paid it, if another cheque came in, and that payment reduced the

customer's balance below the amount of that next cheque, they were justified in dishonouring the next cheque. That was the event which would happen, and that was also the event which did happen when the second cheque was presented, so that if it is a bill of exchange payable on demand, the action must fail. On the other hand, it may be a bill of exchange payable on the date which it bears. In the case of *Foster v. Mackreth* (L.R. 2 Ex., p. 166) Martin, B., says: "We have considered the case a great deal, and much doubt has existed upon the point in my own mind, and in the minds of the other members of the court; but we are all of opinion that we cannot in substance distinguish this cheque from a bill of exchange at seven days' date." Kelly, C.B., says: "For the purposes of our decision it is only necessary to hold that, so far as regards its practical effect, a post-dated cheque is the same thing as a bill of exchange at so many days' date as intervene between the day of delivering the cheque and the date marked upon the cheque. In the case of *Ex parte Richdale, in re Palmer* (19 Ch. Div. 409, at p. 417), Brett, L.J., now Lord Esher, says: "On the 25th April they gave him a cheque for the amount of the debt, a cheque not payable on demand, but dated 28th April. This was equivalent to giving him a promissory-note not payable till the 28th April." Of these two cases, the first was certainly before the Bills of Exchange Act was passed. The next one was on or about the time, but the same principle is clearly deducible from the case of the *Royal Bank of Scotland v. Tottenham* (1894, 2 Q.B., 715), in which Brett, L.J., now Lord Esher, took part, and which could not have been decided unless Lord Esher remained of the same opinion that he was before. So that as far as the English authorities are concerned, on an Act which is exactly similar to ours, on the same words, and the same section, I take it that the authorities at home are that this would be a bill of exchange payable at the date which it bears. But, as I say, for the purposes of this case, it is not necessary to decide it, and so far as I am

concerned I leave it entirely open whether it is or is not, so that when the case arises my mind will be free from the embarrassment of a previous expression of opinion. Assuming, however, that exhibit No. 4 is a bill of exchange payable on the day of its date—the 6th April—it had been issued, and it had got into the hands of Johnston and Castling. They paid it into the Queensland National Bank, and the latter forwarded it to Magill's bankers. The present Bills of Exchange Act says that it is not necessary to present a bill for acceptance, unless it is payable at sight, but *Byles on Bills*, at p. 205, says it is in all cases advisable for the holder of an unaccepted bill to present it for acceptance without delay, for in case of acceptance the holder obtains the additional security of the acceptor. If this was a bill of exchange it would be advisable to forward it for acceptance at least. Now, what are the duties of the drawer? He accepts bills of exchange drawn on him in respect of assets of the drawer in his hands at the time; and I take it that if the acceptor had assets of the drawer in his hands to the value of £20, and he had received and accepted a bill of exchange for £20, he would be entirely justified, if he received a second bill for £20, in refusing to accept it. Now the plaintiff put the banker in that position. This cheque (exhibit 4) having been forwarded for acceptance, assuming the banker had more moneys of the drawer, or owed more money to the drawer than the amount of it, he was bound to accept it. If he had accepted it he would no longer have owed the drawer sufficient moneys to pay the second cheque that was sent in, and he would have been entitled to dishonour the second cheque, and so on with the third or any number. It must be recollected that the banker pays these bills of exchange and cheques not out of the moneys of the customer, but out of his own moneys, and he charges them in account with the customer. If he were entitled to accept exhibit No. 4, and thus render it legal and proper for him to refuse the next cheque; or if he pays out of his own moneys the first cheque, how much more is he free from any liability to accept or pay cheques

or bills of exchange drawn on him after that. True, he might not at the time that the second cheque had been presented, although he had out of his own moneys paid this exhibit No. 4, be entitled in the account to charge the customer Magill with the amount of the post-dated cheque, £2 18s., but he was entitled, having that in his hands, and having accepted the amount which left not enough to meet the cheques afterwards coming in, to dishonour those cheques; and whether or no they were entered on the pass book, he was equally entitled. Therefore, on these grounds, I consider it is not necessary to decide whether this is a bill of exchange payable on demand, or whether it is a bill of exchange payable on the true date. As I have said, argument may arise on that at some future time. So far as I can see, the English authorities show that a post-dated cheque may be drawn and operate as a bill of exchange payable on the day of its apparent date. Whether it is law or not there is no necessity for me to decide, and I do not. With regard to the rest of the case, as to the presentation of the banker's pass book, and whether or not that amounts to a notice that they won't pay, I think it entirely depends upon the facts and the circumstances under which it is presented, and I think it is a question for the jury to say whether or no that pass book coupled with the surrounding facts amount to the fact or proof of the fact that the bankers gave notice that they did not intend to honour cheques except on that account. I think that is entirely a question for the jury and not a question for this court. I simply rely on the grounds for the decision which I have given. The judgment must be for the defendants, and the appeal must be allowed with costs.

REAL, J.: I concur in the judgment of the learned Chief Justice in its entirety. If I did not concur with the learned Chief Justice I should concur with the judgment of my learned brother Harding.

Appeal allowed with costs.

Solicitors for the appellants: *Thynne & Macartney*.

Solicitors for respondent: *Roberts & Roberts*.

MULHOLLAND v. KING.

Contract for board—Implied condition of good behaviour—Immorality—Practice—Evidence in reply.

Defendant, by a written agreement, agreed to provide plaintiff with board for three years at a fixed rate. The agreement contained no provision as to the plaintiff's behaviour. Before the three years had elapsed, defendant, on the ground of plaintiff's alleged immorality with defendant's female servant, refused to supply him further with board.

Held that the breach of contract was not justified by the alleged immorality.

Semble (Griffith, C.J., and Real, J.) that it is an implied condition of a contract involving a personal relation between the parties that neither party will be guilty of such misbehaviour as would render the continued performance of the contract an intolerable burden to a reasonable person.

Per Harding, J.: Immorality not being illegal, and the parties to a contract having the power to provide in the contract against it, no condition of good behaviour can be implied.

During the hearing of the action the plaintiff in cross-examination denied the truth of certain statements contained in evidence which had been taken on commission, and which was afterwards given for the defence to prove the alleged immorality.

Held that the plaintiff was entitled to give evidence on his own behalf in reply to the defendant's case, notwithstanding that he had been so cross-examined.

APPEAL from a decision of Mr. District Court Judge Paul, after trial with a jury, that judgment be entered for the defendant.

This was an action in which the plaintiff sought to recover damages for breach of a contract by which defendant agreed to provide him with board for three years at a fixed rate.

The defence set up was that the plaintiff had been guilty of immoral conduct with defendant's female servant, whereupon defendant refused any further to perform the contract. In the course of the trial the jury found that the defence was proved, but assessed the damages at £41 17s.

The learned judge entered judgment for the defendant. The plaintiff appealed.

Sydes for appellant.

Dickson for respondent.

During the argument the following authorities were cited:—

Anson on Contracts, p. 822; *Erversley*, 988; *Winstone v. Linn*, 1 B. & C., 460; *Stephen on Evidence*, 180; *Selwyn*, N.P. (18 Ed.), 80; *Atkin v. Acton*, 4 C. & P., 208.

GRIFFITH, C.J.: The plaintiff and the defendant entered into an agreement that the plaintiff should board at Womblebank station, of which the defendant was manager, for a term of three years at an agreed price. Womblebank was the terminus of a mail line which was to be conducted by the plaintiff during that period, and it appears that the nearest place where he could live if he did not live at Womblebank was twenty-five miles away. The agreement was in terms that he should "board" there. The learned District Court Judge held that this term included lodging. Probably it at least included permission to live somewhere on or near the premises. Whether shelter was to be provided for him or he was to provide it for himself is not of much consequence. The defendant alleges that after a lapse of about twelve months he refused to allow the plaintiff to continue on the premises, or to supply him with board any longer, on the ground that the plaintiff had been guilty of immorality with defendant's female servant. That defence is based on the assumption that in a contract of this sort there is an implied condition that the boarder will not so conduct himself. I am inclined to think that in every contract which involves a personal relation between the parties there is an implied condition that neither party will do anything which would render the continued performance of the contract intolerable to a reasonable person. In the case of a boarder, I am inclined to hold that there is an implied condition that the boarder will not so misconduct himself as to render his continuance in the house an intolerable burden to the owner. It is not unreasonable to hold that such a condition is implied. But it must be remembered that the ground for holding any condition to be implied in a contract is that it must from the nature of the case have been in the contemplation of the parties at the time when the contract was made. I think it probably was in contemplation in this case that

neither should so conduct himself as to cause an intolerable burden to the other. The defendant agreed that the plaintiff should be allowed to live at or near his house for three years. It is contended that that included an implied obligation that the plaintiff would not be guilty of any immorality on the premises for three years. Can it be said that that was a condition in the contemplation of the parties when the bargain was made? I think not. We do not sit here to justify immorality, but if a party to a contract wants to insist that the other party who is to live at or near his house shall not be guilty of immorality, no matter to what temptation he may be exposed, it would be just as well that he should express it in the agreement. The mere fact that a man is guilty of immorality, when there is no implied contract that he shall not be guilty of immorality, is not a ground for putting an end to a contract. Mr. Dickson contended that although that fact might not of itself be sufficient, the conduct of the plaintiff might be so intolerable that the defendant could not reasonably be expected to allow him to remain. No circumstance is disclosed in the evidence, except the condition of the servant. I do not think that anything in the evidence would justify a jury in finding that any condition which can be held to have been implied in the contract had been broken. The defendant's defence, therefore, fails altogether. The damages have been assessed by the jury at £41 17s., and in my opinion the appeal should be allowed, and judgment entered for the plaintiff for £41 17s., with the costs of the appeal. Another point was raised as to evidence in reply. After the evidence in support of the defendant's case had been given, the plaintiff offered evidence in reply to show that he had not been guilty of the immorality alleged. That was rejected by the learned judge on the ground that the plaintiff had been already cross-examined on the point. Now there is a great difference between a man answering questions under cross-examination, and putting his own case forward for himself. The fact that a plaintiff has been cross-examined on a matter of defence raised by the defendant

does not prevent him from making his own case in reply. If he has gone fully into the matter in cross-examination, and given all the evidence that he wishes to give, there would be no use in calling him again, and probably a new trial would not be granted if he is prevented from merely saying over again what he had previously said. If it appears that he merely wanted to repeat evidence that he had already given, probably the judge would be justified in not allowing him to do so; but a plaintiff is not precluded from making a case in reply merely because he had been previously cross-examined on the matter.

HARDING, J.: As far as the result, I am of the same opinion, but I do not think it will be necessary for this decision to in any way lay down that it is part of a lodger's contract that whilst he occupies his lodgings he will not be guilty of intolerable conduct. I have searched very carefully this morning, and I can find no *dicta* or authority to that effect. Here, the contract was to feed the plaintiff, and provide a place for him to sleep in for a certain period. There was no provision that if he committed an impropriety, the contract should be at an end. The defendant has not taken the precaution to retain in his hands the power to terminate the agreement on either a substantial or frivolous ground. The immodesty or immoral conduct of the servant girl might afford ground for an action for loss of service, but nothing else. I cannot understand how it is to be presumed a part of this contract. I think that judgment should be entered as suggested by the learned Chief Justice.

REAL, J.: I concur in the judgment of the learned Chief Justice and for the reasons given by him.

Appeal allowed, with costs.

Solicitors for appellant: *Bouchard & Holland*.

Solicitors for respondent: *Morris & Heiner*.

MALONE v. WRIGHT, HEATON AND CO.

Contract — Performance of condition precedent — Burden of proof.

An agreement in writing between W. and M. that, in consideration of M.'s transferring to H. the license, goodwill and furniture of an hotel, W. would become surety to M. for the payment by H. of £300, and would endorse H.'s promissory notes for that amount, contained the following words:—"This agreement being conditional upon the said H. giving a bill of sale over the said hotel, license and furniture prior to the transfer of the license." M. transferred the licence, etc., to H. No bill of sale was executed by H., and W. refused to sign the promissory notes. M. brought an action against W. for specific performance of the agreement, or for damages.

Held, that the signing of the bill of sale was a condition precedent to W.'s liability, and that the action failed.

MOTION to set aside a judgment of Chubb, J., after a trial by a jury, directing judgment to be entered for defendant with costs.

Lilley for appellant.

Byrnes, A.G., and Mansfield for respondents.

GRIFFITH, C.J.: The plaintiff sues on a promise by the defendants to endorse promissory notes for £300, which were part of the purchase money of a hotel, goodwill, and fixtures which the plaintiff agreed to sell to Mrs. Heath. The defendants agreed to endorse the promissory notes by an agreement in writing, which contained these words: "This agreement being conditional upon the said Annie Maria Heath giving a bill of sale for the said hotel, license, and furniture, prior to the transfer of the license." The license was then in the plaintiff's hands, and he was entirely protected, since he need not have transferred it until he got the endorsement from the defendants. It is admitted that no bill of sale was executed by Mrs. Heath. It was contended for the plaintiff that it was the defendants' duty, as they were to be the holders of the bill of sale, to prepare it, and procure Mrs. Heath to execute it. I think it is quite plain that the intention of the parties was that plaintiff was to produce a duly executed bill of sale before the defendants were to be called on to give their endorsement. Plaintiff did not produce the bill of sale, and the defendants declined to give their endorsement. Consequently

there was no cause of action at all. The appeal will be dismissed, with costs.

HARDING and REAL, JJ., concurred.

Solicitors for appellant: *Bernays & Osborne.*

Solicitor for respondents: *G. V. Hellicar.*

BRISBANE CIVIL SITTINGS.

HARDING, J. 18, 15, 19, 20, 21 August, 1895.

GILBERT v. BOURNE.

Real Property Act of 1861 (25 Vic. No. 14), ss. 48, 126, 127—Assurance Fund—Person deprived of land—Fraud—Mortgagee—Bona fides—Laches—Memorandum of Transfer in blank.

G., the registered proprietor in fee-simple of land under the Real Property Acts, borrowed money from L., and purported to sign a receipt for the same, whereas he, in fact, signed a memorandum of transfer in blank of the land, which was to be security for the loan. On offering to pay back the loan, it was discovered that L. had lodged the certificate of title and memorandum of transfer with the E. S. and A. Bank. The name of the vendor, consideration and attestation clause were afterwards inserted by L. before the document was brought to the bank. L. affixed his signature on the memorandum of transfer in the presence of the bank's officials. The bank made no inquiries as to L.'s authority to fill in the blanks. A certificate was issued in L.'s name and pledged with the bank.

Held that G. had been deprived of the land by fraud, but that he allowed L. to remain in possession of the documents, and by so doing, induced the defendant to believe that L. was entitled to deal with the land.

Held also that he was not entitled to recover from the assurance fund, as the bank, by making inquiries, ought to have discovered the fraud, and could not sustain their title as against the plaintiff.

Semle—A memorandum of transfer in blank is absolutely void.

Action by plaintiff against the Registrar of Titles, as nominal defendant, to recover damages from the assurance fund, for deprivation of land by fraud.

Gilbert, being the registered proprietor of an estate in fee-simple of certain land in Upper Edward Street, Brisbane, in December, 1893, went to Herman Levy, a money-lender, to borrow money to pay rates, and offered the certificate of title of the said land as security. Levy said he

would lend him £20 for twelve months, charged him £3, and stated if he wanted further assistance he could get it. Levy wrote out what purported to be a receipt for £20, and Gilbert signed it and received a cheque. It subsequently transpired that the so-called receipt was a memorandum of transfer. In August, 1894, Gilbert asked Levy for £10. On two occasions Gilbert received £5, each time signing what was represented to him to be a receipt, but which in reality turned out to be promissory notes for £23 and £40 respectively. In December, 1894, Gilbert raised £100 with King and King to pay off his debt to Levy, and a dishonoured promissory note for £10, apparently signed by himself. Gilbert asked for his deeds from Levy, who told him they were at his private house. The fact was Levy had lodged them with the English, Scottish, and Australian Bank as security for an overdraft. Levy referred Gilbert to the manager, and Gilbert paid £34 towards the dishonoured note. He discovered that the memorandum of transfer, purporting to have been signed on 18th December, 1893, by himself in the presence of a clerk named Lang, had been lodged by Levy in October, 1894, with the Real Property Office, and that Levy had been registered as proprietor in November, 1894. In the same month he mortgaged the land with other properties to the bank.

Lilley and Connolly for plaintiff.

Byrnes, A.G., and Shand for defendant.

Evidence was admitted as to what took place in the interviews between the plaintiff and Levy.

HARDING, J., intimated that he proposed putting a general question. Did Levy obtain the transfer by fraud? No objection was raised.

The manager and accountant of the bank gave evidence as to the bank's dealings with Levy.

Levy was adjudicated insolvent on 25th of January, 1895, and had since absconded.

Byrnes, A. G., moved for a nonsuit on the ground that there was no evidence that the plaintiff had been deprived of his land within s. 126 of the Real Property Act; that if he had been deprived by fraud, he could have recovered from the bank,

who were not *bona fide* mortgagees for value, and that he was entitled to be reinstated on the register by an action against Levy and the bank. The bank ought to have been made a party. *Messer v. Gibbs* (1891), A.C. 248, and s. 127. Levy derived no benefit, as his account was larger before than after the registration. The deed was not attested as required by s. 48. The bank could not take a better title than Levy.

Lilley submitted the want of parties was no reason why the plaintiff should not obtain relief. If the jury found the bank were *bona fide* mortgagees for value, no action would lie against them. *Queensland Trustees v. Registrar of Titles*, 5 Q.L.J., 46.

The nonsuit was refused.

The jury found that Levy obtained the memorandum of transfer by fraud, that Levy had become the registered proprietor, and a certificate of title was issued to him; that the bank lodged a bill of mortgage over the land for registration; that at the commencement of the action there was due on the mortgage £1078 8s. 2d., and was now due £987 5s. 4d.; that the value of the land was £550; that Levy was adjudicated insolvent on 25th of January, 1895, and had since absconded, and his whereabouts were utterly unknown to the plaintiff; that the defendant had no notice or knowledge of the facts constituting the fraud; that the plaintiff signed the memo. of transfer; that he allowed Levy to have possession of the memorandum and certificate of title; that by so doing he represented to and induced the defendant to believe that Levy was entitled to be registered, and to deal with the land; that he was guilty of negligence and improper conduct, and was thereby deprived of the land; that the plaintiff's signature was the only writing on the memorandum of transfer when he signed: when the bank received it it was altered by the insertion of the vendor's name, consideration, and attestation clause, with Lang's signature; that the signature of Levy was affixed in the presence of the bank officials; that Lang did see the plaintiff sign; that the consideration was not truly stated; that the bank

took the certificate of title and memorandum of transfer without inquiring as to Levy's authority to fill up the blanks; and damages were fixed at £500.

Byrnes, A. G., moved for judgment for defendant.

Lilley moved for judgment for the plaintiff, on the finding that plaintiff had been deprived of his land by fraud, and in consequence of an entry made in the Register Book.

HARDING, J.: That is not sufficient. You will have to show that the parties benefiting by that entry can sustain their title in equity against the plaintiff. The fraud was practised on the plaintiff in such a way that the bank ought to have found it out. If they had made any inquiry they would have discovered that the plaintiff had been defrauded. As far as I can see, there must be judgment for the defendant. It is not necessary for decision in this case, but after careful consideration of the Real Property Act, I think that there is formidable, if not irresistible, argument that a blank transfer is no better than a blank deed. The Act is very specific and clear as to what constitutes any memorandum of transfer in the same way as in a deed. To constitute a deed there has to be a sealing. To constitute a memorandum of transfer certain details must exist before it becomes a transfer. I have a strong opinion that such a document is absolutely void.

Judgment for defendant.

Solicitors for plaintiff: *Thynne & Macartney*.

Solicitor for defendant: *J. Howard Gill, Crown Solicitor*.

ROCKHAMPTON CIRCUIT COURT.

CHUBB, J. 24th September, 1895.

REGINA V. WILLIAM TRACEY.

Criminal Law — 29 Vic., No. 11, ss. 15, 16—

Attempt to discharge a loaded arm—Failure of attempt from want of priming or other cause.

A revolver, loaded in some of its chambers, and capable of being discharged if the trigger is drawn a sufficient number of times, is a loaded arm within the meaning of 29 Vic., No. 11, s. 16

The prisoner drew the trigger of a six-chambered revolver, which was loaded in three consecutive chambers, three times, the hammer falling upon the empty chambers. Before he had time to draw the trigger a fourth time, the weapon was knocked out of his hand.

Held, there was evidence of an attempt to discharge loaded arms.

The information against the prisoner was under 29 Vic., No. 11, s. 15, for attempting to discharge loaded arms with intent to murder.

Power for the Crown.

Pattison for the prisoner.

It appeared that the prisoner, on the 19th May, had been drinking and fighting with another man in the yard of an hotel at Barcaldine. There was a large crowd of men in the yard. The prisoner had knocked down his opponent, who rose, and was about to renew the struggle, when the prisoner drew from his belt a six-chambered self-acting repeating revolver, loaded in three consecutive chambers, and pointed it at the crowd. At this moment a police constable in plain clothes rushed through the crowd, and cried, "Stop that, Tracey!" The prisoner then pointed the weapon at the constable's breast, and said, "Stand back, or I'll put a ball through you," and immediately drew the trigger three times. Three distinct clicks of the hammer falling on the chambers were heard, but the hammer having fallen on the unloaded chambers, it was, of course, not discharged. Before the prisoner could draw the trigger again the constable closed upon him, and knocked the weapon out of his hand. Upon examination, it was found that the next pull of the trigger would have caused the hammer to fall on a loaded chamber.

The question was raised whether the revolver was a loaded arm within the meaning of the statute, and whether there was evidence of an attempt to discharge it.

CHUBB, J., referred to *Regina v. Jackson*, 17 Cox, 104, per Charles, J., and said he was of an affirmative opinion on both points, but would, if necessary, reserve the questions for the consideration of the Full Court.

The prisoner was acquitted.

IN CHAMBERS.

GRIFFITH, C.J.

26th July, 1895.

IN THE WILL AND CODICIL OF G. L. MATTHEWS.

Letters of administration—Notices of intention to apply—Waiver of irregularity in notices—Attestation of power of attorney—Notary Public—Equity Act of 1867 (31 Vic., No. 18), s. 53.

The court or a judge may, under special circumstances, waive irregularities in the prescribed notices of intention to apply for administration.

A power of attorney attested in England by a notary who signed his name and affixed his seal, held to be sufficiently attested.

APPLICATION by the attorney of an executor for letters of administration with exemplification of the will and codicil. Annexed.

A. W. Fraser, under a power of attorney from the executor of the will of G. L. Matthews, applied for letters of administration with exemplification of the will and codicil. The Registrar refused to make the grant on the grounds (1) that the advertised notices of applicant's intention to apply were headed "In the will," etc., instead of "In the will and codicil," and (2) that the power of attorney under which the application was made was insufficiently attested, as it was signed before a notary public who had merely attached his seal and had made no declaration as to the identity of the person whose signature he witnessed.

On a reference to the Judge in Chambers, it appeared from the affidavits filed that the testator had died in England, and that the executors who resided there had taken out probate in England, but that the property disposed of by the codicil was in Queensland.

The following cases were cited on behalf of the applicant: *Re Connolly* (Griffith, C.J., 6th Feb., 1895), *Nye v. Macdonald* (L.R. 3 P.C., 381), *Armstrong v. Stockham* (24 L.J. (Ch.) 176), *Equity Act of 1867* (s. 53), *Brooke* (2nd Ed., 17), *Re Ellis* (Griffith, C.J., 2nd Jan., 1895). The Registrar referred to *Re Knox's Lands and Goods* (Real, J., 2nd Nov., 1894).

GRIFFITH, C.J.: I think that under the circumstances of the case, the irregularity in the

advertisement may be disregarded. As regards the sufficiency of the attestation of the power of attorney, I shall follow my previous decision in *Re Ellis*. I think that as the power of attorney is properly attested as a document for use in the Equity side of the court, it is properly attested within the meaning of Probate Rule 26, whether s. 53 of the Equity Act is applicable or not. Administration will therefore go.

Solicitors for applicants: *Roberts & Roberts*.

OCTOBER SITTINGS OF THE FULL COURT.

CASTLEMAINE BREWERY AND QUINLAN, GRAY AND CO.,
BRISBANE, LTD., v. COLLINGS, *Ex parte* COLLINGS.

Quashing order—Meaning of "order" under s. 209 of Justices Act of 1886 (50 Vic., No. 17)—Person aggrieved—Power of attorney—Justices Act of 1886, ss. 4, 209.

Under s. 209 of *The Justices Act of 1886*, any persons feeling aggrieved by a conviction or order of justices may appeal to the Supreme Court by way of quashing order.

C., who was a licensed victualler under *The Licensing Act of 1885*, gave to G. & Co. (a registered company) a bill of mortgage and bill of sale over the stock-in-trade, etc., on his licensed premises, containing a power of attorney to G., a director of the company, authorising him to instruct a solicitor to make any application to a licensing authority necessary to be made under the Licensing Act. G. took possession of the licensed premises under their security, and on the following day G.'s solicitors, acting under the power of attorney, made an application in C.'s name to a police magistrate with regard to the license. The magistrate thereupon signed, as P.M., a document which, after reciting that it had been shown to him that C., the holder of a licensed victualler's license, had closed his licensed premises contrary to the provisions of the Licensing Act, that it was necessary that the business should be temporarily carried on, that G. & Co. were the owners of the premises and stock-in-trade, and that L., their agent, was a fit and proper person to hold a license, concluded in these words: "I certify that the said L. is hereby duly authorised to sell liquor under such license (C.'s license), subject to the provisions of the said Act, in like manner as if he had been the original licensee."

Held that the application to the magistrate having been made by C.'s attorney, C. was not a person aggrieved within the meaning of the section.

Held by Griffith, C.J., (*Real J., dubitante*), that the doc. was not an order within the meaning of s. 209 of the Justices Act.

APPLICATION to make absolute order *nisi* calling on Phillip Pinnock, Police Magistrate, Castlemaine Brewery and Quinlan, Gray & Co., Brisbane, Ltd., and John Landy, to show cause why "an order made by the said Phillip Pinnock on 7th September, 1895, at Brisbane, whereby William Silver Collings, holder of a licensed victualler's license, was declared to have closed his licensed premises contrary to the provisions of *The Licensing Act of 1885*, and that it was necessary that the business lately carried on by him under the said license should be temporarily continued, and whereby it was ordered that John Landy was duly authorized to sell liquor under the said license," should not be quashed on the grounds (1) that the said Phillip Pinnock had no jurisdiction to make the said order; (2) that the said order was made in the absence of the said William Silver Collings, without notice to him, without his being heard, and without giving him an opportunity of being heard thereupon. The order also asked for costs.

Sydes moved the order absolute.

Byrnes, A.G., and *Lukin* showed cause.

Both parties filed affidavits on the merits. The facts relevant to the decision appear in the judgments of the learned judges.

Byrnes, A.G.: There are two objections to the form of this appeal. Firstly, the appellant is not a party aggrieved within the meaning of s. 209 of *The Justices Act of 1886*, either at law (*R. v. Justices of Middlesex*, 3 B. & Ad., 938; *Harrop v. Bailey*, 6 E. & B., 218; *R. v. Justices of Andover*, 16 Q.B.D., 611; *Drapers' Co. v. Haddon*, 9 T.L.R., 86), or, in fact, since the application for the order was made by his attorney (*Garrett v. Justices of Middlesex*, 12 Q.B.D., 620; *R. v. Justices of Brisbane*, 6 Q.L.J., 95). Secondly, the order complained of is not an order or conviction within the meaning of the section. (*Justices Act, s. 4*; *Ex parte M'Farlane*, 3 Q.L.J., 60; *R. v. Webster*,

Ex parte Collins, 5 V.L.R. (L.), 107; *R. v. Edwards*, 13 Q.B.D., 586, 594-5; *R. v. Pickles*, 8 V.L.R. (L.), 126).

Sydes submitted that the matter complained of was an order within the meaning of the section, and that the appellant was a party aggrieved. He cited *Ex parte Official Receiver* (19 Q.B.D., 174), *Ex parte Sidebotham* (14 Ch.D., 458, 465), *Esdaile v. Lammuzee* (1 Y. & C., Ex. 394), *Penny v. Hogg* (29 L.J., Ch. 677).

GRIFFITH, C.J.: This is an application for a quashing order in respect of a document dated 7th September, and signed by Mr. Pinnock, Police Magistrate and a Licensing Justice for the licensing district of Brisbane. The document is adapted from the form No. 7 in the seventh schedule of the Licensing Act, which is a form of permission to carry on business after the death of a licensee. The instrument recites: "It being shown to me, the Police Magistrate for the Licensing District of Brisbane, that William Silver Collings, the holder of a licensed victualler's license under *The Licensing Act of 1885*, and dated the first day of July, 1895, for the premises therein described, has closed his licensed premises contrary to the s. 10 of *The Licensing Act of 1885*, and that it is necessary that the business lately carried on by the said William Silver Collings in virtue of the said license should be temporarily continued, and that John Landy, of Brisbane, is the agent duly nominated by the Castlemaine Brewery and Quinlan, Gray & Co., Brisbane, Limited, the owners of the said premises, goodwill, and chattels in and about the said hotel, per George Wilkie Gray, as attorney, duly constituted, of William Silver Collings, and is a fit and proper person to carry on the said business in the said licensed premises." Having recited that, it proceeds: "I, the undersigned, certify that the said John Landy is hereby duly authorised to sell liquor under such license, subject to the provisions of the said Act, in like manner as if he had been the original licensee." It is objected by the Attorney-General that this is not an order within s. 209 of the Justices Act. It clearly is not a conviction. Is

it an order? An order is defined by s. 4 as "an order made upon a complaint of a breach of duty," and "breach of duty" is defined as "any act or omission (not being a simple offence, or a non-payment of a mere debt) upon complaint whereof justices may make an order on any person for the payment of money, or for doing, or refraining from doing, any other act." I think, reading those two definitions together, that an order is a document signed by a justice, which at least purports to direct some person to pay money, or to do, or refrain from doing, some act. This document, on the face of it, purports to be a certificate that Landy is authorised to sell liquor under Collings' license. I confess that I do not see that that involves by necessary implication an order on Collings to refrain from selling liquor or doing any other act. I think that this objection is a good one, and that this is not an order within the meaning of the Justices Act. I confess I do not know on what authority this document was signed. No authority has been cited to us which would authorise the Police Magistrate to put his signature to such an instrument. If it was a judicial determination at all it might possibly be open to review, and to be quashed on *certiorari*, or possibly by some other means. The objection taken is that it was not an order within the meaning of s. 209, and I think that that objection is a good one. The Attorney-General also raises the objection that the only persons entitled to appeal from an order of justices are persons aggrieved. It is said that Collings was not aggrieved, first, because he was evidently not affected by this instrument, and, secondly, because the instrument was really granted on his own application by his attorney. If it had the effect of ordering him to do, or refrain from doing, anything, I should certainly think that the applicant was an aggrieved person. If it ought to be read as an order that he is to refrain from selling liquor on those premises, I certainly think that Collings would be aggrieved; but I do not think it has that effect. But if it is anything more than a mere paper signed by Mr.

Pinnock without any authority or jurisdiction, then it is a document signed on the application of the appellant himself; and a person who applies to justices for an order cannot, under ordinary circumstances, come to a superior court to get that order quashed. If a person puts the officer of a judicial tribunal in motion, he cannot afterwards come and object to the superior court that that judicial officer did what he was asked to do. That is, under ordinary circumstances. Possibly there might be some instance in which the court would allow him to do so, but the circumstances must be very extraordinary, and I do not know of any such instance. It appears to me that both objections are good, and that the order should be discharged, with costs.

REAL, J.: I agree with the judgment of the learned Chief Justice, except that I would be inclined to hold, if it were necessary to decide the question, that the instrument signed by the Police Magistrate was an order within the provisions of the Justices Act. It is not necessary, on this application, to decide that question, but some day it may arise, and I do not wish it then to be said that the Full Court unanimously decided that a direction by a magistrate to one person to take the place of another did not amount to an order to that one not to act. In all other respects I agree with the judgment of the learned Chief Justice.

IN CHAMBERS.

GRIFFITH, C.J.

15th November, 1895.

Re KLATTE.

Insolvency Act of 1874 (38 Vic., No. 5), ss. 40 et seq. — Debtor's petition — Debtor without the jurisdiction.

An adjudication will not be made on a debtor's petition when the debtor is not within the jurisdiction of the court.

PETITION by Gosselke Klatte for adjudication of insolvency against himself.

The petition purported to have been signed by the petitioner at Perth, Western Australia, and no evidence was offered of his intention to return to Queensland.

Leeper, for debtor, asked for an order of adjudication.

GRIFFITH, C.J.: I do not think I can adjudicate the petitioner insolvent upon this petition. It appears that he is not within the jurisdiction of the court, and there is no evidence of any intention on his part to return to the colony.

The petition was withdrawn.

Solicitor for the debtor: *R. J. Leeper*.

BRISBANE CIVIL SITTINGS

REAL, J. 29th November, 1895.

POYSER v. MOUNT SHAMROCK GOLD CO., LTD.,
AND ANOTHER.

Company—Debenture—Floating security—Bill of sale—Lien ticket—Goldfields Act of 1874, Reg. 38—Foreclosure—Form of order.

A limited company, by six debentures at different dates, charged all its present and future real and personal property and interest in lands, and all its plant, machinery, debts, goodwill, chattels, effects, and assets, and generally all its property real and personal, for the repayment of the sums and interest secured thereby. The debentures were to be a floating security, and the moneys so secured were to be payable if default were made in payment of principal or interest for 21 days. A bill of sale was subsequently given by the said company over certain machinery and plant as collateral security to the said debentures, and a lien ticket under regulation 38 of *The Goldfields Act of 1874* was also given as security collateral with the bill of sale. Default having been made in the payment of interest in the first debenture, application was made for foreclosure on all the property comprised in the debentures, bill of sale, and lien ticket.

A declaration of charge and a direction for inquiry and account were made, and in default of payment the company was ordered to do all acts and execute all conveyances necessary for vesting in the plaintiff the property comprised in the debentures, bill of sale and lien ticket.

Sadler v. Worley (1894), 2 Ch. 177, followed.

Motion for judgment in default of pleading under O. XXIX, r. 10.

The plaintiff, *Poyser*, was the holder of six debentures, dated the 21th of January, 15th of May, 3rd of August, 1st of November, 1893; 16th of January and 11th of May, 1894, for £500 each, all carrying interest at 10 per cent. The company was incorporated in England, and registered in Queensland under *The British Companies Act of 1886*.

By each of the debentures the company agreed to pay on a specified date to the plaintiff, his executors, administrators or assigns, the sum of £500 and interest at the rate of 10 per cent., payable half-yearly; and the company thereby charged with such payments "all its present and future real property and interest in lands, and all its present and future plant, machinery, stock, book and other debts, goodwill, chattels, effects and assets, and generally all the present and future property, real and personal, and undertaking of the company." The debentures were to be a floating security, and were subject to a condition (*inter alia*), that if default were made in the payment of the principal or interest on the same for 21 days, the principal sum should become payable, and all right of the company to deal for any purpose with any of the property should forthwith cease.

The company, on 23rd May, 1893, gave the plaintiff a bill of sale, duly registered, over its machinery and plant for the better repayment of the money secured by the debenture of 24th of January, and further advances.

On 22nd of July, the defendant, *Peter Richardson*, being the registered holder of an extended claim at Mount Shamrock, in the Degilbo district, as trustee for the defendant company, at the request and by the direction of the defendant company, by a lien ticket under Regulation 38 under *The Goldfields Act of 1874*, granted to the plaintiff a lien on such extended claim held under a consolidated miner's right, and all lands, gold mining rights and premises comprised in any gold mining lease that might issue in his name of any

lands adjacent to or occupied with such extended claim or machine area, as security collateral with the said bill of sale. The lien was registered in the office of the warden of the Paradise Goldfield.

Default was made in the payment of the interest due on 24th of July, 1894, under the debenture of the 24th of January, 1893. The plaintiff took possession of the mortgaged property, and made demand on the company for payment.

A writ was then issued claiming foreclosure or sale. The defendant company did not enter an appearance, and a notice of motion for judgment in default was filed, asking for (1) a declaration that the plaintiff was entitled to a charge on all the property, funds, assets and effects of the defendant company for securing the repayment of the principal moneys and interest on the said six debentures, bill of sale, and lien ticket; (2) an inquiry what property, assets, and effects were comprised in the said bill of sale, lien ticket, and debentures, and the charge thereby created, and in whom the same were then vested; (3) an account of what was due to the plaintiff for principal and interest as the holder of the debentures, bill of sale, and ticket, and for the costs of the action, and that the defendants might be adjudged to pay to the plaintiff what might be found to be due to him on taking such account within three months, the plaintiff being ready and willing, and thereby offering, upon being paid his principal moneys, interests and costs, at such time to release and convey the mortgaged premises as the court should direct; (4) that in default of such payment the defendant company might be foreclosed of their equity of redemption in the mortgaged property, and a declaration made that the plaintiff is entitled to an absolute conveyance of the same, or, in the alternative, that an order might be made for the sale of the same or any part thereof, and that the plaintiff might have leave to bid at such sale.

Byrnes, A.G., and Scott, for plaintiff, cited Sadler v. Worley (1894), 2 Ch. 170; Halifax Banking Co. v. Radcliffe, W.N. (1895), 63; Oldrey v. Union Works, ib. 77; Marwick v. Lord Thurlow

(1895), 1 Ch. 776. [REAL, J.: Is there any authority for foreclosure as to personalty?] Yes. *Daniells' Ch. Practice*, 1891; *Seton* (4th Ed.), 1095. [REAL, J.: Can the court do more than order sale under r. 88? It is a statutory provision. It will not do for me to make an order which would not confer a good title.] The lien ticket is in statutory form. There is nothing to prevent a charge by an instrument of mortgage. The debenture covers all property of the company. The company is not in liquidation. If an order for sale is made, leave to bid should be given to the lienee. *Carter v. Wake*, 4 Ch.D., 605.

Chambers, for defendant Richardson, to submit to the order of the court.

REAL, J.: As to the debentures and bill of sale, there is no doubt about foreclosure. The relief should be the same for all the securities. The same property is secured and the debt is the same. I think the difficulty as to the lien ticket can be avoided by not making the usual order in a foreclosure decree. The order is: Declare as in paragraph one of the notice of motion; direct an inquiry and account as in paragraphs two and three; and declare and order as in *Sadler v. Worley* (1894, 2 Ch. 177), that if the defendant company make default in paying to the plaintiff the amount certified to be due by the time aforesaid, that the plaintiff will be entitled to the hereditaments and premises comprised in the said debentures, bill of sale, and lien ticket, free and clear from all right, title, interest and equity of redemption of, in, and to the said premises, and to have an absolute conveyance. And it is ordered that in such case the defendant company and the defendant Richardson do all such acts and execute all such conveyances and deeds as may be necessary for vesting in the plaintiff the said mortgaged property. Liberty to apply.

Solicitors for plaintiff: *Hart, Flower & Drury*.

Solicitors for defendant Richardson: *Chambers, Bruce & McNab*.

REAL, J. 21st, 22nd, 25th, 29th November,
2nd, 8rd, 4th, 5th, 6th, 7th December, 1895.

DAVIES v. WILLIAMS.

Will—Testamentary Capacity—Delusions—Prior Will—Revocation—Costs out of estate.

A man subject to delusions may make a will, and such a will is valid if the delusion did not affect him in disposing of his property. Where a testator is proved to have a delusion, the *onus* is on the persons propounding the will to prove that the delusion did not affect the testator at the time of making his will.

A will making no provision for his wife, and revoking former will in which reasonable provision was made, was declared invalid on the ground that the testator suffered under a delusion as to his wife's fidelity. Probate of an earlier will, as contained in a draft copy and instructions, was granted on the evidence of one attesting witness. The earlier will had been burnt immediately after the second one had been executed. The costs of all parties were allowed out of the estate, but the defendant, who was the widow of the testator, was, under the circumstances, granted her costs as between solicitor and client.

Banks v. Goodfellow (L.R. 5 Q.B., 549); *Smee v. Smee* (5 P.D., 84), followed.

Action by William Davies and Thomas Williams, as executors, for probate in solemn form of the will of David Williams, late of Gympie, deceased, executed on 12th of January, 1895, in the presence of Anthony Conwell and William Farrelly, the attesting witnesses. The defendant, the widow of the testator, denied the due execution of the will, alleged that he was not of sound mind, memory and understanding at the time he was alleged to have executed the will, and that he did not know and approve of the contents thereof. The capacity of the testator was impugned on the ground that he was labouring under a delusion as to his wife's fidelity.

Byrnes, A.C., and *Lilley* for plaintiffs.

Power, Rutledge and Scott for defendant.

By the will of 12th January, 1895, the testator granted legacies of £3,000 each to his sons Thomas and John James, and £2,000 to his son David, £2,000 each to his two married daughters, and directed his trustees to pay the income from £2,000 to his wife for the support and maintenance of his child Jeanie, but if his wife in the opinion of his trustees should misconduct herself,

or be guilty of improper behaviour, or marry again, the income was to be taken from her. If Jeanie died, the money was to be divided among the other children. If she became twenty-one, or married, then she was to receive the £2,000. The shares in all companies held by the testator were to be divided among the sons. By a will bearing date the 22nd September, 1893, the shares were not given to his sons. The specific money legacies to Thomas, John James, and the two daughters were the same as in the later will, David was to receive £1,500, and the trustees were to pay to the defendant the income of £3,000 for the support of herself and his daughter Jeanie, with a proviso that if Jeanie died the wife was to receive the income of £1,500 until she married again, and that if Jeanie became twenty-one or married she was to receive £1,500, and the income from the remaining £1,500 was to be paid to the wife until she married again. If the child died and the defendant died or married again, the £3,000 was to be divided equally amongst the other children. After payment of the specific legacies, any residue was to be divided equally among the wife and children. The estate was valued at over £20,000. Williams left a widow, three sons, and three daughters surviving him. From the evidence it appeared that the testator, who was 64 years of age, had been seriously ill in September, 1893, and made his will at that time. He had been in Wales in 1890, where he married the defendant, who was his second wife, and by whom he had one daughter, Jeanie. They returned to Gympie and resided there till March, 1894, when they went to England, and returned in November, 1894. In December, from 12th to 26th, the testator was under medical treatment for gastro-hepatic disorders. The doctor, having no suspicion of brain trouble, saw no symptoms of it, and was not informed of an illness in Wales a few months previous, nor of the illness in September, 1893. Evidence was given that the testator was a shrewd business man, had transacted business, signed cheques, and conversed rationally on mining and other subjects before

and after the 12th January. On the 15th April following, the deceased came to Dr. Taylor, in Brisbane, complained that he had been ailing for some time from pains in the head, giddiness, and nausea, and also referred to an illness in Wales some seven months previous, which had come on suddenly after walking up a hill. The doctor stated that in his opinion it would not have been safe for him to make a will then, unless it was absolutely necessary, and that he himself would not have been a witness to such a will. On 29th April he again saw the doctor, and visited him daily till the 9th May. On one of these occasions he complained to the doctor that his wife was carrying on with some men at the hotel where they were staying. The doctor considered it a delusion. On 22nd May he again came to Brisbane, when the doctor found him a raving maniac, and sent him to the St. Clair Hospital, where he remained till 14th June. His condition gradually improved, but he was never cured of his delusion as to his wife's fidelity. He told the nurses of it constantly, complained once of a steward on the steamer, and also coupled his wife's name with a doctor at Gympie. He had a stroke of paralysis on 2nd July, and died of hemiplegia on 16th July.

The defendant deposed that on the voyage out he had accused her of misconduct with a steward on the steamer several times; that there was no foundation for such a charge; that he repeated the charge after their return to Gympie frequently in the months of January, February and March. Other witnesses stated that they had heard him say something to the same effect. A man (Ayers) stated that he was painting at the deceased's house in the middle of January, and that during a conversation the testator said he had a good wife, and shortly afterwards he heard him complaining to his wife about her misconduct on the ship, and said she was no better than a common prostitute. In May, the deceased accused her of going out in a buggy with a doctor, and his son John of driving them. This was admitted by the son to be a delusion. He also complained of

his house being full of whoremongers. He afterwards apologised to his son and his wife, and said he only imagined these things.

Medical witnesses stated that a man could transact his ordinary business and yet be subject to a delusion which might interfere with his capacity to make a will; that a delusion as to a wife's fidelity was not an uncommon form of insanity; that at times it was difficult to discover a delusion. Dr. Scholes said that if the delusion existed before the will was made, it would still be there; that it would not come and go, and might operate on his mind.

The deceased had told his wife in September, 1893, that he had made his will, and left her in the same position as his son Tom, and never mentioned that he had revoked that will. Except when he was quarrelling with his wife and making these charges against her, they admittedly lived on affectionate terms, and cohabited. Dr. Taylor deposed that the sexual desire might dominate the delusion for the time being. Dr. W. S. Byrne was of opinion that the illness in Wales and subsequent illnesses to death formed a chain of evidence pointing to brain disease. The doctors called for the plaintiffs did not agree with this, and were of opinion that from the symptoms described there was nothing to shew a want of testamentary capacity in January, and that if there were a delusion it would be sure to manifest itself if his wife's conduct were discussed. The deceased was a reserved man. Witnesses testified that about Christmas Day (1894) and early in January he complained of his head; that he was childish in his ways; that his conversation was broken and disconnected. The plaintiffs alleged that the wife was of unsteady habits and addicted to intemperance, and for that reason the alteration had been made in the will. The defendant denied that she had ever been the worse for liquor, but admitted she drank spirits with the deceased at his request, and whenever she required it. It was alleged that, on certain specific dates, she was drunk. It was proved that she was perfectly

sober on these dates. There was no suggestion made of infidelity on her part.

Rutledge cited *Smee v. Smee*, 5 P.D., 81, 92; *Boughton v. Knight*, 3 P. & D., 64; *Banks v. Goodfellow*, L.R. 5 Q.B., 549; *Dew v. Clarke*, 8 Add., 79; *Re Lecerf*, 6 V.L.R. (P.), 9.

Byrnes, A. G., cited *Wheeler v. Alderson*, 8 Hugg, 574.

REAL, J., intimated that the earlier will should be propounded. By consent the evidence given was to be taken as evidence between the parties with respect to the execution of that will with any other evidence that might be offered.

The statement of claim was amended by alleging the due execution of the first will, and that it had been revoked by the testator when of unsound mind.

REAL, J., in summing up, said the subject of the validity of a testator's will had so frequently come before the courts for consideration, that the language used by various judges in describing the duties of judge and jury were so accurate that he would content himself by quoting from various cases. At one time it was doubtful whether a man who was insane could make a will. It was decided in *Banks v. Goodfellow* that a man suffering from a delusion could make a will. It was for the jury to say whether the delusion had anything to do with the will or the provisions thereof. It was laid down in *Smee v. Smee* that the burden of proof rests upon those who set up the will, and *a fortiori*, when it has already appeared that there was in some particular undoubtedly unsoundness of mind, that burden is considerably increased. You have therefore to be satisfied from the evidence that has been offered by those who propounded the will of 1867, and the earlier will also, that the delusions under which the deceased laboured were of such a character that they could not reasonably be supposed to affect the disposition of his property. The jury must be careful to see that they gave effect to the mind of the man, and not minister to the demon of insanity. They had nothing to do with the question whether the will

was right or wrong, but it was important to consider whether the will was in accordance with the natural feelings of mankind and with the natural feelings of the particular individual in question at a time when there was no question as to his sanity. The questions to be decided were: (1) Was there a delusion existing at the time the will was executed, and (2) did it affect the testator in the disposition of his property? If it did, the will could not stand. If it did not, it would be unjust to interfere with a man's legal right to leave his property as he wished. If they believed the evidence there was sufficient, in his opinion, to connect the delusion with the will. There was a great conflict of evidence as to the defendant's habits, and some of the witnesses could not be telling the truth. If they were satisfied any of the witnesses were deliberately lying, it would not be unreasonable to discard their evidence. They had to say, looking at the facts as reasonable men, whether the deceased was capable of making a will. They should not pay too much attention to opinions, but regard the facts.

The jury found the will was duly executed; that the testator knew and approved of the contents of the will, but that he was not of sound mind, memory and understanding at the time the will was executed.

The will of 22nd September, 1898, was then propounded. A. Conwell deposed to receiving instructions, which he produced, also a draft copy of the will, and stated the will as executed complied with the draft, with the addition of a clause as to the appointment of new trustees, similar to that in the later will. The will was executed as required by law, and witnessed by himself and Dr. Morgan, who is now in England, and that the testator seemed to understand what he was doing. This will was revoked by the testator, and burnt in his office on 12th January, 1895, immediately after the execution of the later will.

The jury found the will duly executed, that the will was contained in the draft copy and the clause relating to new trustees as marked in the later

will, and that the will was revoked by the testator when of unsound mind.

Byrnes, A.G., moved for probate in solemn form of the will of 22nd September, 1898, and asked for costs out of the estate.

Power moved for a declaration that the will of 12th January, 1895, was invalid, and asked that the defendant be allowed her costs as between solicitor and client out of the estate, citing *Cranley v. Fahey*, 4 Q.L.J., 197; *Horsley v. Dunlop*, 5 Q.L.J., 85; *Haiman v. Whitworth*, 5 N.S.W. R. (P.), 11; and *Lascelles v. MacSwayne*, 6 Q.L.J., 52.

Byrnes, A.G., opposed, and cited *Dodd's Probate Practice*, 819. The practice in England is not to grant solicitor and client costs. There is an understanding that party and party costs are taxed on a more liberal scale in such a case. It is questionable whether the court has power to grant the costs in the manner requested.

REAL, J.: I don't like understandings. I have carefully considered the facts in this case. The defendant has successfully contested the will of 1895, nominally in her own interest, but really in the interest of all the beneficiaries under the 1898 will, with the exception of the three brothers. Some of them actually profit by the earlier will. With regard to the brothers, if David (who lived at home for three years, and travelled with them) had communicated to the plaintiffs all he has communicated in court, there would have been no case for the plaintiffs to go on. His evidence was very vague. He saw her drunk only a few times during the whole period. There can be no question of *bona fides* as regards the executor who is not a relative; and the son Thomas, who is also an executor, seems to be a reticent man and might have acted honestly. There is a decision of this court on the subject, and I shall follow it, though not with the confidence I should like.

Byrnes, A.G., asked for leave to appeal to the Full Court on the question.

REAL, J.: No. If it is in my discretion I shall grant the costs and refuse leave. You can of course appeal on the question of principle.

Lilley applied for costs as between solicitor and client for the plaintiff.

REAL, J.: No. I think I have dealt liberally with you in allowing them out of the estate.

Order. Pronounce against the will of 12th January, 1895. Pronounce in favour of the will of 22nd September, 1898, as found by the jury. Allow the defendant her costs out of the estate as between solicitor and client. Allow plaintiff costs out of the estate.

Solicitors for the plaintiffs: *Tozer, Connell & Tozer.*

Solicitor for defendant: *F. J. Power.*

BRISBANE CRIMINAL SITTINGS.

GRIFFITH, C.J. 2nd December, 1895.

REGINA v. FREEMAN.

Trial on criminal charge—Jurors—Challenges—Order to stand by—Proceedings in absence of jury—Evidence—Dying declaration.

A juror coming to the box to be sworn had put out his hand and had touched but not grasped the book, when he was called upon by the Crown to stand by.

Held that the order to stand by was not too late.

The time during the empanelling of a jury at which the Crown shall show cause for their challenge is in the discretion of the court.

The whole of the proceedings in a criminal trial must be in the presence of the jury.

On the trial of A for murder, a statement by the deceased person (B) was tendered as a dying declaration. At the time of her making the statement, B was in danger of her life from blood-poisoning, of which she died five weeks later. She was informed by her medical attendant that she would never recover. She said, "Let me die." A magistrate was then brought, who said to her, "Are you sure you will never recover?" She said, "Yes." She then made the statement in question, which was reduced into writing by the magistrate. He then read the statement over to B, and she said it was correct. The magistrate then said, "Do you expect ever to recover?" B said "No." The magistrate then said, "This is your dying declaration. Will you sign it?" B signed it.

Both before and after the making of the statement B asked her nurse, "Do you think I shall die?" The nurse said, "No."

The statement contained the words, "Being in a serious state and not expecting to recover."

Held that the statement could not be admitted.

TRIAL of Howard Freeman on a charge of the murder of Katherine Noble Crofton, before Griffith, C.J., and a jury, at the Brisbane Criminal Sittings.

Power appeared to prosecute.

Lukin for the prisoner.

During the empanelling of the jury, a juror, Frederick Webb, was ordered by the Crown to stand by. Mr. Lukin objected that challenge was too late.

On inquiry from the tipstaff and the juror himself, it appeared that the latter had put out his hand towards, and had touched, the book, but that it was still entirely resting in the officer's hand when the juror was called upon to stand by.

Power referred to *Roscoe*, p. 197, and to *Joy on Confessions*, p. 217.

GRIFFITH, C.J.: I think the challenge was in time. The juror will therefore stand by.

When the jury panel had been gone through twice, only ten jurors had been sworn, the prisoner's counsel having peremptorily challenged seventeen jurors. The other jurors had been ordered to stand by. The first of these jurors was then again called, and was again ordered by the Crown to stand by.

Lukin: This is the third time of calling the panel. The Crown can now only challenge for cause.

Power: The Crown need not show cause for their challenge until it appears that a jury cannot be empanelled without recourse to the jurors ordered to stand aside by the Crown.

GRIFFITH, C.J.: The judgment of Bramwell, B., in *Mansell v. Regina* (D. & B., 875) is directly in point. I will follow his opinion, and I therefore hold that the direction to stand by at this stage is to be considered as an application to the discretion of the court to allow the assignment of cause for the Crown's challenge to be postponed. As there are still some twenty jurors unsworn, I will allow the assignment of cause to be postponed accordingly.

During the trial Lukin wished to cross-examine witnesses as to the admissibility of a statement tendered by the Crown as evidence against the

prisoner, and proposed to do so in the absence of the jury.

GRIFFITH, C.J.: I do not think that such a course can be followed. The jury must, I think, be present throughout the whole of the proceedings.

A statement made by the deceased was tendered by the Crown as a dying declaration.

The circumstances of the making of the declaration appeared by the evidence of Dr. Budgett and J. W. Ayscough, and were as above set out.

Lukin objected to its reception, and cited *R. v. Osman* (15 Cox, C.C. 1), *R. v. Gloster* (16 Cox, C.C. 471), *R. v. Smith* (16 Cox, C.C. 170), *R. v. Forrester* (4 F. & F., 857), *R. v. Reaney* (1 D. & B., C.C. 156), 26 L.J. (M.C.) 48.

Power referred to *R. v. Reaney* (*supra*).

GRIFFITH, C.J.: I have had some difficulty in coming to a conclusion on the evidence whether at the moment the deceased made the statement she had a settled and hopeless expectation of death, or whether at that time she still entertained some slight hope that she might recover, or at any rate, would linger for some considerable time. In the case of *R. v. Reaney* (1 D. & B., C.C. 156), which has been cited by counsel for the defence, it was laid down that the question turned upon the state of the person's mind at the time of making the statement rather than upon the expected interval before death. In that case it is to be observed that the patient was suffering from a broken spine, a mortal injury, and knew that he must die. In this case I believe the words used at the time of the declaration were substantially as described by Mr. Ayscough and Dr. Budgett. Ayscough's evidence is that he said to Mrs. Crofton, "You are not expected to recover; we have come to take your dying statement; you appear to be very ill; do you ever expect to recover?" She replied "No." And that after he had taken the statement he said, "This is your dying statement; do you expect to recover?" and that she again replied, "No." Dr. Budgett thinks the question might have been in this form, "Are you sure you will never recover?" To which she replied, "Yes." For my own part I do not pay

much attention to the supposed exactness of verbal recollections of conversations related after a considerable interval of time. In *Reaney's* case a good deal of reliance was placed in argument upon the word "ultimately," as in this case upon the word "ever." I have come to the conclusion, after considerable fluctuation of opinion, that at the time Mrs. Crofton made the declaration she believed that her illness was fatal, and that she would probably never get well. But I do not think she thought that death was actually impending. I think she had some sort of lingering hope of recovery, and I am confirmed in that view by the initial words of the statement itself, namely: "Being in a serious state and not expecting to recover." Under all the circumstances I do not think that the deceased woman had at the time when she made the statement such a belief in the imminence of her death as to render the statement admissible as a dying declaration. I therefore reject the evidence.

The prisoner was acquitted.

Solicitors for prisoner: *O'Shea & O'Shea*.

DECEMBER SITTINGS OF THE FULL COURT.

GRIFFITH, C.J., COOPER AND REAL, JJ.

Re J. C. M'KENNA, AN ARTICLED CLERK.

Articled clerk—Filing of articles—Failure to file articles within time specified—Regula Generales as of 12th December, 1879, r. 49.

An articled clerk had failed to present his articles for registration within the time prescribed by r. 49 of the *Regula Generales* of 12th December, 1879.

Leave was granted to him to file the articles *nunc pro tunc*.

APPLICATION by J. C. M'KENNA for leave to file his articles of clerkship with P. A. O'Sullivan, notwithstanding that the time prescribed by the Rules of Court for their registration had elapsed.

Blair for the applicant.

Sydes for the Board of Examiners for Solicitors.

The affidavit of the applicant showed that owing to a mistake as to the actual date of the execution of the articles, which were executed by the parties on different days, he had presented the articles for registration one day after the time prescribed by the Rules had elapsed, and that the Registrar had therefore refused to register the articles.

Sydes: The Board of Examiners do not wish to offer any objection to the order being made.

GRIFFITH, C.J.: I think that under the circumstances leave may be given to the applicant to file the articles *nunc pro tunc*.

COOPER and REAL, JJ., concurred.

Solicitor for applicant: *P. A. O'Sullivan*.

REGINA v. TIM CROWN.

Crown case reserved—Evidence—Admission made by prisoner after arrest in answer to questions by a constable—Criminal Law Act Amendment Act of 1894, s. 10.

A, having been arrested on a criminal charge, made a statement implicating B in the charge. B was afterwards arrested, and the arresting constable, in A's presence, read over A's statement, which had been reduced into writing, to B. During the reading of the statement B made a further statement to the constable. Held that B's statement was admissible against him.

R. v. Thornton (1 Moo. C.C. 27), *R. v. Rogers* (9 Sup. Ct. Rep. (N.S.W.) 234), and *R. v. Many Many* (6 Q.L.J., 229) followed.

R. v. Thompson (1893, 2 Q.B. 12) distinguished.

Crown case reserved by Mr. Justice Chubb at Mackay Circuit Court.

The prisoner, Tim Crown, who was a Polynesian, was charged, with several other Polynesians, at the Mackay Circuit Court, with wounding with intent to commit murder, and on a second count with wounding with intent to do some bodily harm. On the evidence of a police constable, it appeared that one of the prisoners, Loondooah, after arrest, made a statement to him, which alleged, *inter alia*, that prisoner Crown struck the wounded man about the head and face. Crown was afterwards arrested by the constable, who read over to him this statement in Loon-

dooh's presence. When he came to where Crown was said to have struck the wounded man, Crown said, "No; I only held his head," and showed with his hands how he had held the injured man. This last statement was admitted by the learned judge as evidence against Crown, but at the request of prisoner's counsel he reserved the question of its admissibility for the consideration of the Full Court. In the case stated by him for the consideration of the Full Court the learned judge invited an expression of opinion by the court as to the propriety of police officers putting questions to persons in custody.

Stumm, for the prisoner: The arrest of the prisoner and the reading to him of the confession of his fellow-prisoner operated as a threat, and the confession was not a free and voluntary one. The whole policy of the law is against allowing a constable to obtain an admission from a prisoner by means of cross-examination. The evidence should have been rejected and the conviction ought therefore to be quashed. He cited *R. v. Male and Cooper* (17 Cox, 689), *R. v. Thompson* (1898, 2 Q.B., 12), *R. v. Gavin and others* (15 Cox, 656), *R. v. Bodkin* (9 Cox, 408), *R. v. Day* (2 Cox, 209), *R. v. Moore* (2 Den. C.C., 522).

GRIFFITH, C.J., referred to *R. v. Johnston* (15 Ir. C.L.R., 60) overruling *R. v. Bodkin* (*ubi supra*) and to *R. v. Thornton* (1 Moo. C.C., 27).

V. Power, for the Crown: The whole question is whether an admission made by a prisoner to a constable after arrest is inadmissible within the terms of s. 10 of *The Criminal Law Amendment Act of 1894*. The practice in Queensland has always been to admit such statements, and the law was clearly laid down by Mr. Justice Harding in *R. v. Many Many* (6 Q.L.J., 229) at Bundaberg this year. He also cited *R. v. Rogerson* (9 Sup. Court Rep. (N.S.W.), 284).

GRIFFITH, C.J.: The point raised in this case, as I understand it, is whether evidence of an admission made by an accused person can be received when that admission has been made whilst he was in custody and in answer to questions put by a constable or a person in authority. I

understand that to be the point, although the statement or admission made in the present case was not made in answer to a distinct question. I suppose, however, that there was a standing invitation to him to assent to or contradict the confession of another of the accused, which was being read over to him. It is objected that an admission obtained in this way is not admissible in point of law. As I understand it, the general rule as to admissions made by parties is that they are admissible, and they have sometimes been said to be the best evidence. With respect to admissions made by a person charged with a criminal offence, however, the rule is that the confession must be free and voluntary, or—in terms which I understand to be synonymous—that it must not be induced by threats or promises, using these terms in their fullest sense. I take it that that is an exception to the general rule of admissibility. If that is so, the statute of last year merely affirms the common law, which is that *prima facie* an admission is admissible, but in the case of a criminal charge it is not admissible if it has been procured by means of threats or promises. But it is not inadmissible merely because it is made by a person in custody in answer to questions put to him by a constable. That was held to be the law in England in the case of *R. v. Thornton*, as long ago as 1824. It was held to be the law in Ireland by eight judges out of eleven in 1864, and it was held to be the law in New South Wales in 1870, in the case of *R. v. Rogerson*. It has been followed as the practice in this colony always, as far as I know, and has been expressly held to be the law here in the case of *R. v. Many Many*, tried at the last Bundaberg Assizes. It is true that in the case of *R. v. Thompson*, the latest case, which was decided by the Court for Crown Cases Reserved, it was said that, in order that an admission may be admissible, it must be shown affirmatively that the confession was free and voluntary, that is, that it was not preceded by any inducement to make the statement held out by a person in authority. That proposition, as applied to the facts of that case, is no doubt perfectly

correct. There had been a distinct inducement, in the nature of a promise, held out indirectly to the accused, and it had come to his knowledge, and had operated upon him. It was clear that that inducement having been held out, the admission could not be received. I do not know whether it was intended by the court to dissent from the previous decisions or the previous practice of the English Court. Certainly the case was not one in which the question now under consideration really arose for decision. I do not think we can take this case as overruling the previous decisions or the practice of this court. The real question is in each case, Was the confession induced by a threat or promise? To my mind it is perfectly immaterial on whom the onus of proof rests—whether on the prosecution to show negatively that the admission was not, or on the prisoner to show affirmatively that it was, induced by a threat or promise, because I think it is the duty of the learned judge to satisfy himself that it was not induced by any threat or promise. That being so, the only question for our consideration in this case is, Is the fact that the statement is made to a constable, in answer to questions put by him, proof that it was induced by a threat or promise? I do not think it is. A confession may be made to a constable under the influence of a threat or fear, or terror, or it may be induced by a promise or by the expectation of benefit, or it may not. In the present case there is nothing but the mere fact that it was made to a constable after the arrest in the course of conversation. That is not sufficient to render it inadmissible. *Prima facie* I think it is admissible, and there is nothing to show that it was not admissible. As to the general question whether a constable should ask an accused person questions or not, I desire to express my concurrence with the observations made by Chief Justice Stephen in the case of *R. v. Royerson*, in New South Wales, and with the similar observations made by Parke, B., long before. There may be cases in which it would be highly proper to put questions to a person in custody, and other cases where it would be

extremely improper. On the abstract question as to the manner in which constables should discharge their duty, I do not feel called upon to express any opinion. I think the conviction should be affirmed.

COOPER, J.: I am of the same opinion, and I do not wish to express it in other words.

REAL, J.: I concur in the judgment of the learned Chief Justice. On the question as to the propriety of police-constables cross-examining prisoners I do not wish to offer an opinion. I can conceive of circumstances under which it might be the right thing to do, and on the other hand, I can conceive of circumstances under which it might be most objectionable.

GRIFFITH, C.J.: The conviction will be affirmed.

IN CHAMBERS.

GRIFFITH, C.J. 6th December, 1895.

Re DAVENPORT'S WILL.

Will—Codicils—Revocation.

To D.'s will, found after his death, there were three codicils.

The signatures to the first codicil were found to have been struck through, and the words "Revoked and replaced by another codicil dated 11th day of August, 1890," were written in testator's writing below the attestation clause, but were not attested. The third codicil was dated 11th August, 1890, but contained no formal revocation of the first codicil.

Held that the first codicil was not revoked.

APPLICATION by Emily J. Davenport, executrix of the will and codicils thereto of Ernest J. Davenport, deceased, and by the "Queensland Trustees" for a grant to the Queensland Trustees of letters of administration with the will and codicils.

From the affidavits filed in support of the application, it appeared that the will of the testator was found after his death in his private safe in the state above set out.

Morris, for the applicants, asked for a grant of letters of administration with the will and codicils in their entirety.

GRIFFITH, C.J.: Merely striking through the name of the testator is not one of the modes of revocation allowed by law. The codicil has therefore not been revoked, and administration must go with the will and three codicils.

Solicitors for applicants: *Morris & Heiner*.

IN CHAMBERS.

GRIFFITH, C.J. 9th December, 1895.

QUEENSLAND BREWERY LTD. v. CAMPBELL.

Practice—Writ—Special endorsement—Promissory note payable on demand—Amendment of writ.

In an action on a promissory note payable on demand, the demand was not alleged in the endorsement, but it appeared upon the evidence that a demand had been made.

Leave was granted on the hearing of a summons for final judgment to amend the writ by alleging a demand.

SUMMONS by Queensland Brewery, Ltd., to sign final judgment against A. L. Campbell for £50, amount of a dishonoured promissory note drawn by him and payable on demand, for interest thereon from date of demand, and for costs.

The writ, which was specially endorsed, contained a claim for interest, but did not allege that a demand had been made. The evidence filed on behalf of the plaintiffs showed that a demand had been made, and that plaintiffs had a *prima facie* case. The defendant's evidence disclosed no defence on the merits.

Woolcock, for plaintiffs, asked for leave to sign final judgment for the amount claimed.

Macdonnell, for defendant, submitted that the writ was defective, as failing to allege a demand, and asked that the summons might be dismissed with costs.

Woolcock asked leave to amend the writ by alleging demand.

GRIFFITH, C.J.: This is a case, I think, in which an amendment should be allowed. In the recent case of *Roberts v. Plant* (1895, 1 Q.B. 597), leave was given to amend under very similar circumstances. I shall therefore allow the writ to be amended by alleging a demand. The hearing of this summons will be adjourned. The costs of the adjournment will be reserved.

On a subsequent application the defendant was allowed £2 2s. as his costs of the adjournment, which were ordered to be set off against the costs allowed to plaintiffs.

Solicitors for plaintiffs: *Macdonald-Paterson & Hawthorn.*

Solicitor for defendant: *R. J. Leeper.*

IN CHAMBERS.

GRIFFITH, C.J. 11th December, 1895.

*Re JESSOP'S WILL.**Practice—Affidavit—Jurat.*

In an affidavit sworn by several persons and containing a separate jurat for each deponent, the first of the jurats was in order and began, "Signed and sworn by the said," etc., but the second and each of the following jurats did not contain the words "Signed and sworn," but began, "And by the said," etc.

Held that the jurat was sufficient.

APPLICATION by Sarah Ann Jessop, Jesse James Jessop, and John Stanley Jessop, the executrix and executors of the will of John Shillito Jessop, deceased, and by the Queensland Trustees, for a grant of letters of administration with the said will annexed to the said Queensland Trustees.

It appeared that the jurats in two of the affidavits filed in support of the application were as above set out.

W. F. Wilson, for the applicants, asked leave to read the affidavits.

GRIFFITH, C.J.: I think the jurats are sufficient. Solicitors for applicants: *W. H. Wilson & Hemming.*

IN CHAMBERS.

GRIFFITH, C.J. 4th December, 1895.

Re GRACE, INSOLVENT.

Transfer of work from Southern to Northern Court—Practice—Form of order.

On an application to a judge at Brisbane to send matter for hearing before a Northern judge, it should be shown that the Northern judge has been consulted as to a date convenient to him for the hearing.

The order fixing the hearing of any such matter should contain a request to the Northern judge to hear the matter.

APPLICATION by T. Unmack, the trustee in the estate of James Grace, insolvent, for an examination under s. 114 of *The Insolvency Act of 1874*,

before Mr. Justice Chubb, at Townsville, of J. H. Brown and other witnesses.

(*Green* for applicant.

The trustee's solicitor read the application of the trustee, and asked that 18th December might be appointed for the examination.

GRIFFITH, C.J.: You must communicate with Mr. Justice Chubb as to what date will be convenient for him to take the examination.

Green: Our agents in Townsville have communicated with Mr. Justice Chubb, and I have a telegram from them stating that he is willing to take the examination on the 18th December.

GRIFFITH, C.J. (after referring to *Re Lowry*, 4 Q.L.J., 78): I will fix the examination for that date before Mr. Justice Chubb at Townsville. The order fixing the examination must, however, contain a request to Mr. Justice Chubb to take the examination.

The order was drawn up in the following form:—

UPON HEARING the application of the Trustee of the property of the abovenamed insolvent filed herein on the day of 1895. And upon it being made known that the Honourable Mr. Justice Chubb was willing to take the examination hereinafter directed on the 18th day of December, 1895. It is ORDERED that A.B., of Townsville, in the colony of Queensland, wife of the said insolvent, and C.D., of Townsville aforesaid, contractor, do appear in their proper persons before the Honourable Mr. Justice Chubb, at the Supreme Court House, Townsville, on the 18th day of December, 1895, at the hour of ten o'clock in the forenoon of the same day, and that they respectively bring with them and produce at the time and place aforesaid, all books, deeds, papers, and writings in their possession or control relating to the insolvent, his dealings or property.

AND THIS COURT doth hereby request the Honourable Mr. Justice Chubb to take the said examination and to cause the evidence taken (if any) to be transmitted to the Supreme Court at Brisbane.

Given under the Seal of the Court, &c.

Solicitors for trustee: *Macdonald-Paterson & Hawthorn*.

BRISBANE CIVIL SITTINGS.

GRIFFITH, C.J. 12th and 18th December, 1895.

IN THE LANDS OF JOHN EATON.

Will—Construction—Devise for life or in fee.

Gift by will of "all my messuages, lands, tenements, and hereditaments, all my household furniture, ready money, securities for money, money in banks, money secured by life assurance, goods and chattels, and all other my real and personal estate and effects whatsoever and wheresoever, unto my wife, H. E., to and for her own absolute use and benefit during the term of her natural life, subject to the payment of my just debts, funeral and testamentary expenses, and the charges of proving this my will." The testator then appointed H. E. "sole and absolute executrix" of the will.

Held that H. E. took an estate in fee.

Groom, for J. H. Eaton, next of kin, moved for a grant of administration of the lands of John Eaton, deceased.

The testator's wife survived him, and was now dead.

He cited *Kenrick v. Beaucherk* (3 B. & P., 175), *Jarman* (1146), *Moor v. Denn* (2 B. & P., 247), *Burton v. Powers* (8 K. & J., 170).

GRIFFITH, C.J.: This is a motion for a grant of administration of the lands of John Eaton, deceased. Eaton made a will in the following terms:—"I give, devise, and bequeath all my messuages, lands, tenements, and hereditaments, all my household furniture, ready money, securities for money, money in banks, money secured by life assurance, goods and chattels, and all other my real and personal estate and effects whatsoever and wheresoever, unto my wife Hannah Eaton, to and for her own absolute use and benefit during the term of her natural life, subject to the

payment of my just debts, funeral and testamentary expenses, and the charges of proving this my will. I hereby appoint the said Hannah Eaton as the sole and absolute executrix of this my will."

Testator's widow survived him, but is now dead. The present application is made by Eaton's eldest son, and is based on the assumption that the devise of the land by the will was a devise for the life of Hannah Eaton only, and that there was an intestacy as to the estate in remainder after her death.

Although the court, in dealing with applications for grants of probate or administration, does not ordinarily act as a Court of Construction, it is, I think, proper, when a will has been made by a deceased person, to consider whether it deals with the property as to which a grant of administration is sought. If, therefore, upon the true construction of this will, it contains a valid devise of the land in fee, I do not think I ought to grant administration as upon an intestacy.

Every case of this sort depends upon its own circumstances. But it is an established rule that in construing a will the intention of the testator is to be collected from all parts of it. It is also a rule of construction that when a will casts any duty upon a person named in it, for the performance of which duty the legal estate is requisite, that person is to be taken to have the legal estate. (*Anthony v. Rees*, 2 Cr. & J., 88; *Davies to Thomas*, 24 Ch.D., 190).

Turning to the will now in question, it is contended that the words "during the term of her natural life" operate as a limitation of the legal estate devised by the will. On the other hand the words are, I think, as I intimated during the argument, open to the construction that they are intended only to limit the period of the wife's beneficial enjoyment of the property.

Looking at the whole will, it is, I think, in the first place, impossible to resist the conclusion that the testator thought that he was making a complete legal disposition of all his property,

which he carefully enumerated. He may, however, have failed to do so.

It is to be observed, in the next place, that the gift of his whole estate is to his wife "for," &c., "during," &c., subject to the charge of debts. The subject of the disposition and the subject of the charge seem, therefore, intended to be identical. Now it is, I think, clear that the charge is a charge upon the corpus and not merely upon the life estate of the wife, for otherwise she might be a loser by the gift. These considerations point to the conclusion that the words "for her own absolute use and benefit during the term of her natural life," should be read parenthetically, and not as limiting the quantity of the estate devised by the will (*Burton v. Powers*, 8 K. & J., 170).

This conclusion is confirmed by the concluding sentence, in which the testator appoints his wife "absolute executrix" of his will—words to which the court is bound to give some effect. This, I think, can only be done by holding them to mean that the testator intended his wife to have absolute authority to give effect to all the provisions of his will, including the implied direction to apply his lands, if necessary, in payment of his debts. She could only have that authority by taking the legal estate.

The case of *Doe v. Haslewood* (6 A. & E., 167), and *Doe v. Pratt* (Ib. 180), in which the effect of an appointment of a person as "executor" of lands was considered, tend to the same result.

The 62nd section of *The Succession Act*, so far as it is applicable, affords an additional argument in favour of this conclusion. That section provides that "where any real estate shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication."

The effect seems to be to raise, in cases of doubt or ambiguity, a presumption in favour of the

construction which would give an estate in fee. There is in the present case a devise of land to an executrix. And I do not think that an estate of freehold only, *i.e.*, an estate for life only, is expressly or by necessary implication given to her. There is no question of a term of years.

These reasons have led me to the conclusion, which is, I have no doubt whatever, in accordance with the testator's actual intention, that there is not an intestacy. The motion must therefore be refused.

Solicitors for applicant: *Hart, Flower & Drury.*

GRIFFITH, C.J. 5th, 6th, 19th September, 1895.

SOUTH AUSTRALIAN LAND MORTGAGE AND AGENCY CO.,
LTD. v. M'INNES.

Joint and several covenants—Release of one of two joint debtors—Liability of remaining debtor as principal debtor, and as surety.

A transfer and charge executed by M. and G., over a piece of land in favour of plaintiffs, contained joint and several covenants by M. and G. for the repayment, at a fixed date, of £10,000, with interest. Shortly after the execution of the transfer and charge, M. and G. transferred their equity of redemption in the land to third parties. M. and G. having died, and default having been made, plaintiffs sued G.'s executors, in the Supreme Court of Victoria, for the whole amount due under the covenants. The executors denied all liability and resisted the claim, and it was finally agreed that plaintiffs should receive £750, and £19 16s. costs, in full satisfaction of their claim against G.'s estate in respect of the charge. The executors agreed on their part to transfer all their estate and interest in the transfer and charge and in the land to plaintiffs. Instruments to that effect were executed and interchanged between the parties. The plaintiffs in the release given to G.'s executors, specially reserved their rights under the covenants against M. The plaintiffs then sued M.'s executor for the whole amount due under this covenant.

Held, that the release given by the company to G.'s executors operated as a release of M.'s liability for half of the debt for which as between himself and G. he was surety for G., but did not release M. from his liability as a principal debtor for the other half of the amount due under the covenant.

U

TRIAL before Griffith, C.J., without a jury.

This was an action by the South Australian Land Mortgage Co., Ltd., against Donald M'Innes, as executor of John M'Innes, deceased, to recover £10,109 10s., due under a covenant contained in a transfer and charge duly executed by John M'Innes and Hugh Gillies, in favour of the company.

The facts appear fully in the judgment of the learned judge.

Feez and Lilley for plaintiffs:

The agreement with Gillies's executors was that, in consideration of their paying plaintiffs £750, and £19 costs, and transferring their interest in the mortgaged property to plaintiffs, plaintiffs would refrain from suing Gillies's estate for the debt. There was no intention on plaintiffs' part to discharge any portion of the debt, and the release only amounted to a covenant not to sue with a full reservation of plaintiffs' rights against M'Innes. The interest in the mortgaged property, purporting to be transferred by Gillies's executors to the plaintiffs, was non-existent, since both Gillies and M'Innes had previously sold their equity of redemption in the property. Therefore the transaction could not be set up as an accord and satisfaction of the debt, or even of half the debt. The intention of the parties was that the plaintiffs should refrain from suing Gillies's estate in consideration of the £750 paid them. The plaintiffs were, therefore, entitled to proceed against M'Innes' estate for the whole amount. They cited *Cheetham v. Ward* (1 B. & P., 633), *Hutton v. Eyre*, 6 Taunt., 289), *Solly v. Forbes* (2 B. & B., 38), *Price v. Barker* (24 L.J., Q.B., 130), *Willis v. De Castro* (27 L.J.C.P., at p. 246) *Green v. Wynn* (L.R. 4 Ch., 204), *Bateson v. Gosling* (L.R. 7 C.P., 9), *Duck v. Mayhew* (1892, 2 Q.B., 511), *Commercial Bank of Tasmania v. Jones* (1893, A.C. 318, 316), *Wolmerhausen v. Gullick* (1893, 2 Ch., 514), *Kaye v. Dutton* (7 M. & G., 807), *Courper v. Green* (7 M. & W., 633), *Watters v. Smith* (2 B. & Ad., 889).

Byrnes, A.G., and Shand for defendant. The agreement and the release operated as a discharge

of the whole debt. The attempted reservation of the plaintiffs' rights against M'Innes was wholly inconsistent with other portions of the agreement. Had the plaintiffs taken the action against Gillies' executors to judgment, that judgment would have been a complete bar to any action against M'Innes' estate. As the case stood, the plaintiffs had taken property, money, and money's worth from Gillies' executors, and there had therefore been an accord and satisfaction of the whole debt. Without the express reservation of their rights against Gillies there would have been a complete discharge of the debt, and the reservation being inconsistent with the rest of the instrument ought to be rejected. The release of one of several persons jointly and severally liable for a debt operates as a release of all (*Wolmerhausen v. Wolmerhausen*, 62 L.T., 41). The intention of the parties was clearly that the transaction should operate as a discharge of the debt for which the action was brought against Gillies' trustees—that is, for the whole amount due under the covenant. They also cited *Webb v. Hewitt* (2 K. & J., 488), *Muir v. Crawford* (2 H.L.Sc., 456-9), *Steels v. Steels* (22 Q.B.D., 537-540), *Haigh v. Brookes* (10 A. & E., 309), *King v. Hoare* (13 M. & W., 494), *Kendall v. Hamilton* (4 App. Cas., 501), *Haigh v. Brookes* (10 A. & E., 334), *Re Wolmerhausen* (62 L.T., 541), *Robinson v. Walker* (7 Mod., 153).

Rutledge and Groom, for Simon Fraser and Robert Mailer, executors of H. C. Gillies, third parties, from whom defendant claimed indemnity. We adopt the arguments of the learned counsel for the defendant as to the release of defendant from all liability by the release of his co-debtor, but if that argument fails the claim for contribution against the third parties is untenable, as defendant's utmost liability is only for half the whole amounts due under the covenants. Moreover, even if defendants were not completely released from liability under the charge, the clear intention of the parties at the date of the release of Gillies' estate was that that estate should be entirely exonerated from all claims in respect of the covenants. They cited

Ex parte Snowden (17 Ch.D., 44), *Stirling v. Forrester* (8 Bligh, 591).

Feez, in reply: The plaintiffs' covenant with Gillies' executors was a covenant not to sue Gillies' estate for the debt, and not a covenant to release the whole debt or to relinquish their claim against M'Innes. In any case plaintiffs are entitled to recover from defendant his half of the mortgage debt. He cited *Ford v. Beech* (11 Q.B., 866), *Ex parte Good* (5 Ch.D., 46), *Wegg Prosser v. Erans* (1895, 1 Q.B., 108), *Re Salmon* (42 Ch.D., 351), *Blore v. Ashby* (Ib. 682), *Williams v. Buchanan* (7 T.R., 226), *Williams' Executors*, 1536, 1834.

C.A.V.

GRIFFITH, C.J.: This is an action on a covenant contained in a memorandum of transfer and charge dated December 9, 1887, by which plaintiffs transferred to defendants' testator, Donald M'Innes, and the third parties' testator, H. C. Gillies (by the name of Hugh Gillies) as tenants in common, certain land in Brisbane, subject to a charge for £10,000, and by which M'Innes and Gillies covenanted to pay that sum to the plaintiffs, on December 14, 1892, with interest at 6½ per cent. Shortly afterwards, M'Innes and Gillies transferred the equity of redemption to other persons. Default having been made in payment, and Gillies being dead, the plaintiffs brought an action on the covenant in the Supreme Court of Victoria against his executors. Negotiations took place, which resulted in the execution of two instruments under seal, dated May 9, 1894, which were exchanged between the parties. I find upon the evidence that these two instruments formed part of the same transaction, and together embody the agreement between the parties to the negotiations. By one of these instruments, which was executed by the plaintiffs, and which recited that plaintiffs claimed to be creditors of Gillies's estate under the covenant; that the action was pending against Gillies's executors, who denied their liability; and that plaintiffs had agreed to accept £750 and £19 16s. for costs in satisfaction of "the alleged claim" against Gillies's estate by virtue of the covenant;

plaintiffs released all their claims and rights of action against Gillies's executors and his estate in respect of anything contained in the memorandum of transfer and charge, and agreed to discontinue the action. These words of release were followed by a proviso that nothing in the deed should prejudice the plaintiffs' rights and powers under the transfer and charge other than as aforesaid, and that the plaintiffs "expressly retain and reserve all their rights and remedies against John M'Innis, a party, jointly and severally with the said H. C. Gillies, to the said recited memorandum of transfer and charge." The other instrument was executed by Gillies's executors and delivered to plaintiffs, by whom it was produced at the trial. By this deed, after reciting the memorandum of transfer and charge, the death of Gillies, the default in payment, and that Gillies's executors "have agreed to enter into these presents in consideration of the estate of the said H. C. Gillies being exonerated and discharged from payment of the said moneys," . . . it was witnessed that in consideration of the release by the plaintiffs of even date and of 10s. . . . Gillies's executors agreed to sell to plaintiffs all Gillies's and their own interest in the mortgaged land and in and under the memorandum of transfer and charge. They also covenanted for further assurance. Plaintiffs then brought the present action against defendant, as executor of M'Innes, and claim to recover the whole amount of the mortgage debt and interest from him. The defendant claims that the effect of the instruments of May 9, 1894, being to discharge one of two joint debtors by way of accord and satisfaction, the other joint debtor is consequently also discharged. If, however, the defendant is not discharged, he claims to be entitled to contribution from Gillies's executors, whom he has brought in as third parties. The plaintiffs contend that the release operates only as a covenant not to sue, and that the contemporaneous instrument does not alter its effect, and that they are consequently entitled to maintain an action for the full amount of the mortgage debt against the defendant. The real question for

determination is, in my opinion, entirely one of construction of the deeds of May 9, 1894, executed by plaintiffs and Gillies's executors respectively. It is the duty of the court to ascertain the intention of the parties from the language they have used, and to give complete effect to that intention, unless the court is precluded by some established rule of law or binding authority from doing so. Before examining the language of the deeds it may be convenient to consider for a moment the respective rights and liabilities of the parties when they were executed. As between plaintiffs and the mortgagors each of the latter was liable as a principal for the whole amount of the mortgage debt, and was entitled upon payment of the debt to the benefit of the security. As between themselves, each of the mortgagors was liable as principal for half only of the mortgage debt; as to the other half, his liability as between himself and his co-mortgagor was that of surety only and upon payment of his own half of the debt he was entitled to the benefit of one-half of the security. If called upon to pay more than half he was entitled to be recouped by his co-mortgagor, and in aid of that right to the benefit *pro tanto* of the other half of the security. The equity of redemption having, however, been transferred, the only benefit which the mortgagors could derive from the security was to stand in the place of the mortgagors, and to be recouped by them out of the proceeds of the land to the extent of any payments made by them if the security proved sufficient. Each of the parties was entitled to deal with his own rights in any way that he might think fit.

It is settled that a release of one of two joint debtors, without more, discharges his co-debtor (*Mercantile Bank of Sydney v. Taylor*, 1898, A.C. 317). It is also settled that an instrument which is in form a release of one of two joint debtors, but which contains a reservation of rights against the other co-debtor, does not operate as a release, but as what is called "a covenant not to sue." The principle is that the intention of the parties is to be collected from the whole instrument, and that if effect cannot be given to that intention

by construing the instrument as a release, it will not be so construed (*Price v. Barker*, 24 L.J., Q.B., 190. 4 E. & B. 760). The name by which the instrument is designated is of course unimportant. The effect, not the name, is material. If therefore one of two joint debtors is sued by the creditor after such a qualified release given to his co-debtor, the instrument cannot be pleaded by him as a release of the debt. Whether it could under the old system of pleading have been pleaded at law by the debtor in whose favour it was executed, may be doubtful. (*Solly v. Forbes*, 2 B. & B., 38; *Ford v. Beech*, 11 Q.B., 852, 871.) The release in the present case, if it stood alone, would clearly fall within this principle. It would not therefore operate of itself as a complete discharge of the debt. In some of the cases it appears to have been assumed that such a reservation of rights in a release given by a creditor to one of two co-debtors leaves the creditor free to recover the whole debt from the other co-debtor, and leaves the latter free to recover from the former his share of the debt. It is to be observed, however, that in none of the cases was the extent of the liability of the unreleased debtor in question. The point raised was whether the debt was or was not extinguished altogether. The view that the effect of such a qualified release is to discharge the unreleased debtor to the extent to which, but for the release, he would be entitled to call for contribution from his co-debtor is quite consistent with the actual decision in all the cases, though not perhaps with some of the *obiter dicta*, and seems a natural inference from the equitable doctrine of contribution between joint debtors now embodied in s. 4 of *The Mercantile Act of 1867*. It is, I think, clear that the creditor cannot deprive the unreleased debtor of his right as a surety to contribution from his co-debtor, and that if he does any act which would deprive the unreleased debtor of that right, his own claim against him is *pro tanto* discharged. If the release of one of two joint debtors with a reservation of rights against the other has not the effect of discharging any part of the debt as against the unreleased debtor,

it would, in fact, be a mere covenant by the creditor not to directly enforce payment by an action in his own name, but with full liberty to do so indirectly by calling upon the other debtor for payment in full. I should hesitate before holding that such a construction expresses the real intention of the parties to such an agreement. It is not however, I think, necessary to decide what would be the effect of the release in the present case if it stood alone. The contemporaneous instrument expressed in the plainest language the intention of the parties that Gillies's executors and his estate should be exonerated from the debt, and that plaintiffs should acquire all the rights which the executors had under the security. These rights would have included a right to receive back out of the proceeds of the security, if sold for a sufficient amount, the sum of £750 which they paid. The release also expressed in the plainest language the intention of the parties that M'Innes should not be discharged. It is not, I think, open to doubt that the intention of the parties was that all the liability of Gillies's estate in respect of the whole mortgagor's debt should be absolutely discharged, and that some liability on the part of M'Innes should remain. I have already pointed out the twofold nature of the liability of each of the mortgagors. In my opinion the parties had this twofold liability in contemplation, and intended to treat the liability of the mortgagors as two distinct liabilities in respect of the respective halves of the debt for which they were as between themselves primarily liable. I think that the true construction of the deeds, read together, is that they operate as an agreement that the primary liability of Gillies's estate in respect of his half of the debt should be absolutely discharged; that the liability of his estate as surety for M'Innes's half should also be discharged; that the mortgagees should stand in the place of Gillies's executors so far as regarded their right to any part of any surplus proceeds of the security; and that M'Innes's primary liability for his moiety should remain. Any more limited construction would fail to give effect to some one or more of the express stipulations in the

instruments. It may be doubtful whether it was actually intended to discharge M'Innes's liability as surety for Gillies's half of the debt, but that discharge necessarily follows from the discharge of the liability of his principal (*Webb v. Hewitt*, 3 K.&J., 489). It was contended for the defendants that the complete discharge of the liability of Gillies's estate necessarily operated in law as a discharge of M'Innes. This construction would, of course, give no effect to the express words of the reservation in the release. The answer to the argument is that the parties did not agree to discharge the whole debt, but only the liability of Gillies's estate, which they treated as a distinct liability, separable (as indeed it was in equity) from that of M'Innes. If the equity of redemption had remained in the mortgagors, and Gillies's share in it had been transferred to the mortgagees in consideration of the release, there is, I think, no room for doubt that the effect of the transaction would, even without an express reservation of rights against the co-mortgagor, have been the same as that which I think the parties intended in this case. And I do not think that the circumstance that the interest of Gillies's executors was confined to a possible and limited right of recourse to surplus proceeds of the land makes any difference. This being the intention of the parties, as I collect from their written agreements, and knowing of no rule of law which prevents me from giving effect to it, I am of opinion that the defendant has no answer to the action so far as regards half the debt due on May 9, 1894, but that his liability as surety for Gillies in respect of the other half is discharged. It was further contended that the defendant is entitled to contribution from Gillies's estate as surety in respect of anything that he may be called upon to pay. The right of a surety to contribution from a co-surety does not arise till the surety has paid more than his share of the debt (*Ex parte Snowden*, 17 Ch.D. 44.) The same principle applies, I think, to co-debtors. And as defendant cannot be called upon to pay more than his share of the original joint debt, I think he has no claim for contribution from the third parties. The £750

paid by Gillies's executors must be attributed to Gillies's share of the joint debt. The other half of the debt subsisting on May 9, 1894, remained due by M'Innes. That half has been increased by interest since accrued, and after deducting the net amount of the moneys received by plaintiffs as mortgagees in possession, amounts to £5,715 7s. 8d., for which sum plaintiffs are entitled to judgment. Defendant admits assets to the amount of £5,000, which is not enough to satisfy the whole claim.

Before giving formal judgment I will advert to the question of costs. I think that the third parties were properly brought in, and properly appeared to resist the claim, and that they must be considered as successful litigants, and entitled as such to their costs from the defendants, who brought them into the action. I think also that the action should be considered as an action in respect of two distinct claims, as to one of which plaintiffs succeed, while they fail as to the other. I think that the costs occasioned by defendants bringing in the third parties naturally flowed from the unfounded claim. I think, therefore, that plaintiffs are liable to pay to defendant his costs so far as they have been increased by the third party proceedings, including the costs to be paid by defendant to the third parties. The defendant may, therefore, deduct the amount of these costs from the amount of admitted assets. The plaintiffs will have judgment for £5,715 7s. 8d., and their costs of action except so far as they have been increased by the third party proceedings, and after setting off the costs which they are liable to pay to defendant. Of this amount the judgment will be against the defendant personally for the balance of the £5,000 after the deduction already mentioned, and judgment for the balance will be against M'Innes's assets *quando acciderint*. Defendant is, of course, entitled on payment of the debt to the benefit of one-half of the security.

On the application of the Attorney-General, his Honour allowed the defendant out of the estate his costs not already provided for.

Solicitors for plaintiff: *Macpherson & Feez*.

Solicitors for defendants: *Thynne & Macartney*.

GRIFFITH, C.J.

11th December, 1895.

Re GRACE, INSOLVENT.

Insolvency Act of 1874 (38 Vic., No. 5), s. 114, 116 — Examination of insolvent — Insolvent committed to prison for refusing to answer to satisfaction of Court.

An insolvent on his examination before the Court under sec. 114, failed to answer to the satisfaction of the Court questions relating to his disposal of moneys acknowledged to have been in his hands shortly before his insolvency, and was committed to prison under sec. 116 for six months.

EXAMINATION of James Grace, an insolvent, by T. Unmack, the trustee in his estate, before Griffith, C.J.

Lukin for the trustee.

Wright for the insolvent.

The insolvent deposed that he was a tailor and had carried on business at Allora, and that he left Allora for Townsville. He gave in detail the amounts of money he had in his possession, and also his expenditure up to his leaving Brisbane for Townsville. Then he had with him in cash about £120. He proceeded to Townsville, and after detailing expenditure which would leave him a balance of over £90, he said that he could not say how he spent that amount, but that he supposed it went in drinks and amusements. He opened a tailoring business in Townsville shortly before his adjudication, but after his adjudication he said and now repeated that the goods on the premises did not belong to him, but were bought with the money of his brother-in-law, to whom they belonged.

Lukin applied for an order to commit the insolvent to gaol under s. 116. He cited *Ex parte Lords* (16 M. v. W. 462), *Ex parte Bradbury* (14 C.B., 15). The insolvent was called upon to show cause why he should not be committed. Cross-examined by *Wright*, he offered no further explanation as to the disposal of the money.

GRIFFITH, C.J.: What did you do with the balance of £90 you took to Townsville.

Insolvent: I must have spent it in drinks.

Lukin renewed his application for a committal.

GRIFFITH, C.J.: I am not satisfied with the answer, having regard to the previous answers of of the witness, and I adjudge that he refuses to answer to my satisfaction. I order him to be committed to Brisbane gaol for six months.

Solicitors for trustee: *Macdonald-Patterson and Harthorne.*

Solicitors for insolvent: *Schacht & Cohen.*

DECEMBER AND FEBRUARY FULL COURTS.

GRIFFITH, C.J., COOPER AND REAL, J.J.

In re GOODRICH.

ELLIOTT BROS., LTD. v. CAMPBELL.

Bill of Sale—After acquired property described by general words — Life Insurance Act of 1879 (43 Vic., No. 8)—Liability of policy moneys to payment of debts—Disposal of policy moneys by will.

G., a chemist carrying on business at R. street, Toowoomba, gave a bill of sale to plaintiffs, to secure the repayment of £500 and further advances to be made by them in money or goods in connection with his business. The bill of sale comprised all and singular the stocks of chemicals, drugs, &c., and all other the stock in trade of the said G., in the trade or business of a chemist and druggist, or any other business which then was or which might thereafter be carried on by the said G.; household furniture, effects and things then in, about, or belonging to the shop and premises belonging to the shop and premises of G. at R. street; and all book debts, &c.; and all other property whatsoever of the said G., wheresoever situated, which might at any time, during the continuance of the security, be acquired by him, and whether the same were used in addition to substitution for, or in connection with the premises thereby assigned, or expressed and intended so to be, or otherwise. And it was expressly agreed by the bill of sale that the security should extend to and comprise, not only the mortgaged property therein before particularly set out, but also all further businesses leases, goodwills, &c., of the said G., household furniture, goods, chattels, effects, &c., and all other property whatsoever which the said G. might thereafter acquire or become possessed of, or entitled to during the subsistence of the said security, whether the same might be used either in addition to or in substitution for or in connection with the said mortgaged property therein before set out or otherwise.

G. died, and at the time of his death he was carrying on business at the said shop in T., but he resided in another house in the same town, the property of his wife. Before his death he had been accustomed to import chemicals from England, and to store them at his private residence, taking them thence and using them at the shop as required. Certain of the chemicals acquired after the date of the bill of sale were stored at the private house at the time of G.'s death, and there was also in or about his private residence certain household furniture and effects acquired by G. before his death. Plaintiffs claimed that the chemicals and furniture at the testator's residence were included in the bill of sale, but G.'s executor refused to admit their claim.

Held, that the bill of sale included the chemicals stored at testator's residence, and also such of the furniture as he had acquired after the execution of the bill of sale.

Testator by his will bequeathed all his real and personal estate whatsoever unto and to the use of C. and another upon trust that they should sell, collect, or otherwise convert into money all such parts of the same premises as should not consist of money, and should out of the moneys to arise from such sale collection and conversion and the money of which he should be possessed at his death pay his funeral and testamentary expenses and debts and should invest the residue of the moneys as thereafter provided. At the time of his death, testator was possessed of two insurance policies amounting to about £500. His estate was indebted to several creditors in sums exceeding that amount.

Held, that the creditors of the testator were legatees under the will, and were entitled as such to have the moneys arising from deceased's policies of insurance applied in payment of his debts.

SPECIAL case stated by order of a judge in an action by Elliott Brothers, Ltd., against Charles Campbell, as the executor of the will of John Goodrich, deceased. The case set out a claim by the plaintiffs against the defendant, under the circumstances set out in the head-note, and on those facts the following questions were stated for the decision of the Court:—

1. Whether the property in dispute (*i.e.*, the chemicals and furniture at deceased's private residence) or any and what part thereof is comprised in the said indenture or bill of sale.
2. Whether the moneys secured by the said policies of insurance are, or any and what part thereof, is applicable for the payment of the debts of the said John Goodrich.
3. By whom and out of what funds the costs of this case ought to be paid.

Lilley for plaintiffs.

Macgregor for defendants.

Rutledge asked leave to appear for the widow and son of the deceased as beneficiaries under the will, and offered to submit to any order of the court. He was allowed to appear.

Lilley: The goods and furniture at deceased's private house come within the terms of the bill of sale. The house was practically the bulk store for the shop. As to the furniture, that too was included in the deed, for the deceased gave security over all he possessed. (*Tailby v. Official Receiver*, 13 App. Cas., 523; *London Chartered Bank of Australia v. Fisher*, 11 N.S.W., Eq. 193; *Richards v. Cohen*, 7 W.N., N.S.W., 57). As regards the insurance moneys, testator's will contained a trust for the payment of his debts, and on the authorities the insurance moneys are under those circumstances available, and ought to be applied in the payment of his debts (*Kelly v. Brumm*, 2 Q.L.J., 130; in *re Leris' will*, *Lilley*, C.J., 4th December, 1880; *Scharffenberg v. Unmack*, 4 March, 1880 (Full Court); *King v. Tate*, 10 N.S.W., Eq. 232). Every man is at liberty to direct his assurance money to be applied for the payment of his debts (*Davey v. Pein*, 10 V.L.R., Eq. 306; and *Allen v. Edmonds*, 12 V.L.R., 789), and the plaintiffs in this case claim to be in the position of legatees under a will. The plaintiffs are not seeking to make the insurance moneys liable by any process of court for the payment of debts, but merely to follow the terms of the will under which they claim to be legatees.

GRIFFITH, C.J.: You say it is simply a question of construction whether he gave these policy moneys to pay his debts.

Lilley: Quite so. There is no express trust in the Act for the wife or children. What will be done with the money if plaintiffs do not succeed?

GRIFFITH, C.J.: Possibly it would be like a gift to a charity which failed under the Statutes of Mortmain.

Lilley: The Insurance Act of 1879 did not take away testator's dominion over his property. A man might have cogent reasons for desiring his

debts to be paid out of the ready money of his insurance policies. He might wish to save valuable real estate for instance. Was he debarred by the Act from taking such a course? What is to prevent a man from doing by will what he may do by deed? Policy moneys may be assigned to a trustee, and he may collect them after the death of the insured, and pay his debts with them. In short, every man has full power to dispose of his insurance moneys, either by will or deed as he pleases, and in this case the testator has left it to pay his debts.

Macgregor: As regards the bill of sale, the intention of the testator was that it should be limited to property in Ruthven Street. It could be reasonably construed as having a sphere of operation limited to the Ruthven Street premises. The interpretation to be put on the words "where-soever" and "whatsoever" was not a literal one. (*Greenbit v. Sneed*, 35, L.T.N.S., 168; *Reid on Bills of Sale* (1895) 87.) On the question of the insurance moneys the second section of the Act of 1879 was intended to be a statutory prohibition against testators making their policy moneys applicable to the payment of their debts. The words of the section are quite sweeping enough to prevent creditors from obtaining the policy moneys in any way. (He cited *Campbell v. Stephens*, 13 V.L.R., 308; *King v. Gale* (*ubi sup.*) at p. 236; *Re Gresson*, 10 N.Z.L.R., 57; *Re Donaldson*, 23 S.A.L.R., 141; *Maxwell*, p. 413.)

GRIFFITH, C.J., referred to *Anderson v. Anderson* (1895, 1 Q.B., 749), and *Baerselman v. Bailey* (1895, 2 Q.B., 301).

Rutledge: The Act holds out a distinct warning to creditors that they may not have recourse to insurance moneys for the payment of their debts. The class of persons whom the Act intended to benefit appears in the preamble of the Act—namely, the wives and families of deceased persons. A man cannot defeat that intention of the Legislature by making a will, nor should the plaintiffs be allowed to contravene the statute by obtaining a judgment against the defendant in respect of these insurance moneys.

Lilley, in reply, cited *Arthur v. Bokenham* (11 Mod., 148), *R. v. Wimbledon Local Board* (8 Q.B.D., 452), *Re Sowerby's Trusts* (2 K. & J., 630), *Turner v. Martin* (26 L.J., 6 Ch., 216).

GRIFFITH, C.J.: With regard to the first question, the terms of the clause of the mortgage with which we are concerned are as large as they could be made, and the question for the court is simply whether the property in dispute is included in these terms or not. It is not necessary to consider whether they are large enough to cover property of any and every kind that might have been acquired during the subsistence of the agreement. The question is limited to the chemicals and the household furniture. The chemicals in question were acquired by the testator after the execution of the bill of sale. They were stored at his private house, and from time to time removed to his shop. The language of the clause is quite large enough to cover them, and I see no reason why a more limited construction should be adopted. I think, therefore, that as far as the chemicals are concerned, there is no doubt that they are included in the plaintiffs' mortgage. With regard to the household furniture, it is to be observed that the household furniture described in the deed was that in the shop in Ruthven-street. The deed does not, therefore, include the household furniture in the private house. But the general words as to future property include household furniture which might be acquired or of which the testator might become possessed during the subsistence of the security, whether used in substitution or in addition to any of the mortgaged property or otherwise. Giving literal effect to those words, there can be no doubt they covered household furniture acquired after the bill of sale. In my opinion, therefore, the first question ought to be answered that the property in dispute, so far as it consisted of chemicals, stock-in-trade, and household furniture acquired after the bill of sale, was included, but that the household furniture in the possession of the testator at the execution of the bill of sale was not included. If necessary, an inquiry would have to be made to ascertain

what property of that sort he possessed at the time the deed was executed. As to the second question, I am not prepared to give an opinion at the present moment.

COOPER, J.: I concur.

REAL, J.: I also concur.

As to the second question, C.A.V.

11TH FEBRUARY, 1896.

GRIFFITH, C.J.: The second and more important question in this case arises upon the construction of s. 2 of the *Life Insurance Act of 1879* which provides as follows:—"The property and interest of the insured in any policy of assurance *bona fide* effected upon his own life shall not in the event of his insolvency pass to the trustee of his estate, nor shall the property and interest of the insured in such policy, or the property and interest of his personal representatives in such policy, or the moneys payable under or in respect of such policy, be liable to be made available for or towards the payment of his debts by any judgment, decree, order, or process of any court, or in any other manner whatsoever.

"Provided that in the case of the death of the insured within three years from the date of insurance a sum equal to all sums which shall have been paid by way of premium, with simple interest thereon at the rate of six per centum per annum, shall be set apart from the moneys payable under the policy, and shall be available for the payment of the debts of the insured."

The protection of the section does not, however, extend to moneys received in respect of a policy by the insured in his lifetime.

The testator in the present case made a will by which he directed that his executors should, out of his moneys and the moneys to arise from the sale, collection and conversion of his estate, pay his funeral and testamentary expenses and debts, and invest the residue for the benefit of his family. Part of his estate consisted of two policies of insurance which had endured sufficiently long to come within the protection of the *Life Insurance Act*. The plaintiffs claim that under this disposition the policy moneys must be applied in payment of the testator's debts. The residuary

legatees, on the other hand, say that this action is an attempt to make the policy moneys available for the payment of the debts of an insured person contrary to the true meaning of the Act. The substantial question to be determined is whether the Act has any application to testamentary dispositions. Before considering this question it will be convenient to advert to the law as it stood before the passing of the Act. At that time a policy of life insurance was personal property, which belonged to the insured, and over which he had full power of disposition, either by assignment in his lifetime or by will. It was liable to be taken in execution under a judgment against him (*Common Law Process Act of 1867, s. 57*); and in the event of his insolvency it passed to the trustee of his estate. Upon his death the right to receive the policy moneys passed to his personal representatives, in whose hands they were legal assets available for the payment of his debts, subject to which they were distributable according to the directions of the will or of the Statutes of Distribution. The Act of 1879 was passed to alter this law. It deals both with the right of the insured in his lifetime and with that of his personal representatives after his death. All the modes by which he might be deprived of his interest in the policy during his life and against his will are specifically mentioned, and the policy is made in effect inalienable in his lifetime without his consent. But the Act does not contain any provision limiting his power to deal with it of his own motion in his lifetime. On the contrary, s. 6 expressly protects assignments of policies made for a valuable consideration; which might be an existing debt. It was not necessary to mention voluntary assignments, for there is nothing in the Act which could be construed as affecting them. So far, then, as regards the insured himself while he lives, the Act protects him, but does not control his power of disposition by any act that can take effect during his lifetime. Does it interfere with his freedom of disposition by an instrument to take effect after his death—i.e., by will? It is to be

remembered that the Act deals with a special subject only, and makes no express reference to testamentary disposition, or to the statute of general application—*The Succession Act of 1867*—which deals with them. In the absence of any such reference, I think that explicit and unambiguous language would be required to indicate, by what is called necessary implication, an intention to interfere with the testamentary powers of an insured person. The language is, however, by no means free from ambiguity. The words "or the moneys payable under or in respect of such policy" may, grammatically, be read either as a separate subject of the verb "shall not be liable," or as part of the description of the things in which the personal representatives have a property and interest. Having regard to the construction of the whole sentence, I think the latter is the true reading. The term "property and interest" is quite apt to denote the rights of the insured in respect of the policy, and also those of the personal representatives in respect of the policy and the moneys payable under it, while the words "moneys received under the policy" would be a more natural form of expression to denote the actual policy moneys, when got in by the personal representatives, than the words "moneys payable," &c., which are found in the section. I will, however, deal with both constructions.

Adopting the first construction, the section, omitting that part of it which relates to events that can only happen in the lifetime of the insured, will read: "The property and interest of the personal representatives of the insured in the policy or in the moneys payable under or in respect of it, shall not be liable to be made available for or towards the payment of his debts by any judgment, decree, order or process of any court, or in any other manner whatsoever." Does this provision clearly indicate, by necessary implication, an intention to interfere with the power of testamentary disposition? The words "liable to be made available," used, as they are, in connection with words relating to legal proceedings, seem to suggest that the mind of the

Legislature was still addressed to proceedings *in invitum*, by which property which the owner does not himself apply in payment of his debts may, nevertheless, be made available for that purpose without his aid. In strictness, indeed, the intervention of a Court of Justice is not needed to make legal assets in the hands of a personal representative "available" for the payment of debts, although it may be needed to compel him to apply the assets in a due course of administration. There can, however, I think, be no doubt, especially having regard to the proviso, that these words indicate not only that the intervention of the court is not to be invoked for the purpose of compelling the application of the subject matter of the enactment, whatever that is, in payment of the debts of the insured, but also, that the personal representative may not of his own motion apply it in satisfaction either of his own debt or of the debts of others. I am disposed to give full literal effect to the words "or in any other manner whatsoever," and not to treat them as necessarily limited by the context to modes of "making available," which are analogous to legal proceedings. (See *Anderson v. Anderson*, 1895, 1 Q.B., 749.) At the same time I have some difficulty in seeing how policy moneys can be said in any accurate sense, or even in a colloquial sense, to be "made available," except by the aid of a Court of Justice, or by some act on the part of the personal representative which is authorised by the general law governing the application of legal assets. These words, therefore, do not seem to carry the matter any further. Consider now what is the subject matter of the protection. It is, on the construction which I adopt, "the property and interest of the personal representatives in the policy moneys," and the protective provision is that this property and interest shall not be liable to be made available for payment of debts. What is this property and interest? It is to be observed that no distinction is made between an executor and an administrator. It may be inferred, therefore, *prima facie*, that the property and interest in question is of the

same nature in both cases. And I think that, if possible, some effect is to be given to the words "property and interest" as indicating something not the same as that which would have been denoted by the words "moneys payable," &c., standing alone, although no doubt for some purposes, and in some contexts, the two expressions might be synonymous. Now the property and interest of the insured himself includes both the formal or legal right to enforce the contract contained in the policy, and also the beneficial interest in the policy moneys when received. The title of the personal representatives of a deceased person, whether he is intestate or not, is derived from the grant of administration or probate. By virtue of that grant the personal estate is vested in them, upon trust for the next of kin or legatees, subject to a charge of the debts of the deceased. His property and interest is different from that of the beneficial owners, and is limited to the right of legal dominion or control. This right is exactly analogous to the legal estate of a trustee to whom land is devised in trust. In either case the property in question is charged by law with the debts of the deceased, and the legal estate formally vested in the trustee may be taken for the purpose of paying them. I think that the term "property and interest" expresses this legal estate as distinguished from the whole legal and equitable interest in the policy moneys, and that the effect of the enactment is therefore merely to extinguish the charge of debts to which that legal estate was subject, so leaving the whole benefit of the estate to the legatees or next of kin. There can be no doubt that this is the effect of the enactment in the case of intestacy. I see no sufficient reason for a different conclusion in the case of a will. This conclusion is confirmed by a consideration of the operative words by which the protection is afforded, and to which I shall have to call special attention in dealing with the second of the two possible constructions already mentioned, which I proceed to do. Adopting that construction, the enactment will read "nor

shall the moneys payable under the policy be liable to be made available," &c. Upon this it may be observed that the word "liable" imports the idea of a risk to which the thing spoken of is exposed, and which may befall it, at the option of some power over which the person interested has no control. If, then, the Legislature desired to enact that a testator should not be able by his will to direct that policy moneys, his own property, should be applied in payment of his debts, they have certainly chosen a singular form of words to express that idea. For, according to the argument, the property which is forbidden to be applied in payment of debts is the policy moneys, and the forbidden mode is the testator's will. The enactment then is to be read, "The moneys payable under a testator's life policy shall not be liable to be made available by his will for the payment of his debts." That is to say, the testator's property shall not be exposed to the risk of the testator's volition. So much for the word "liable." The words "made available" raise almost equal difficulties in the way of Mr. Rutledge's contention. For all a testator's property was already by law available for the payment of his debts. To speak, therefore, of a testator's will as a means by which it is made so available, would be, to say the least, a very inaccurate form of expression. If language were found in a statute that was only susceptible of one construction so as to give the enactment any effect, it would be the duty of the court to construe it accordingly, however inaccurate or inapt the language might appear; but I think that such an apparent inaccuracy or inaptness should lead the court to consider whether there is not some other construction that would give effect to the will of the Legislature. If, therefore, the grammatical construction now under consideration is to be adopted, I think the use of the words "liable" and "made available" must be taken of themselves to indicate that the protection is against some risk that might arise from some person other than the testator himself, and against some act that would have the effect of producing &

result which would not otherwise occur. There is nothing in the Act which directly suggests an intention to interfere with freedom of testamentary disposition. The provisions of s. 6, already mentioned, which protects assignments of policies made for valuable consideration, were referred to in argument as indicating that, but for these provisions, s. 2 would have had the effect of invalidating such assignments, and that as they had been especially protected, while testamentary dispositions in favour of creditors were not mentioned, the latter were invalidated. I do not think, however, that this would be a legitimate inference to draw, even if s. 6 were not otherwise necessary. But that section might well be introduced, not only for the purpose of removing doubts and of showing that the intention of the Legislature was not to interfere with the freedom of disposition of the insured himself, but also to protect the rights of an equitable assignee, or assignee of a policy under a partial assignment, although the formal right to recover the policy moneys were vested in the personal representatives. So far, therefore, from finding in s. 2 an explicit and unambiguous expression of intention to interfere with freedom of testamentary disposition, I am of opinion that the Act does not in any way affect or deal with the power of disposition of the insured himself either in his lifetime or by will, but that the provisions of the second section have merely the effect of depriving creditors of that right of recourse which, under the general law, they would have against the policy during the life of the insured, and against the policy moneys as legal assets in the hand of his personal representatives. In the present case the meaning of the words of the will admits of no doubt. It is not necessary to consider whether a mere charge of debts would have a similar effect, but I am not to be understood as suggesting any doubt on that point. The result, in my judgment, is that the gift of the policy moneys as part of the testator's estate for the benefit of his creditors as a class is valid, and that they are entitled, as objects of his bounty, to have the trusts of the will in their

favour carried into execution. But it must be understood that they take as legatees, described by the term "creditors," and not under the general law which entitles creditors to recourse against the estate of a deceased debtor.

Solicitors for plaintiffs: *J. F. Fitzgerald.*

Solicitors for defendants: *F. G. Hamilton.*

IN CHAMBERS.

REAL, J.

8th and 9th January, 1896.

Re ALFRED SHAW, *Ex parte* HUGHES.

Insolvency Act of 1874, s. 47—Creditor's petition—
Good petitioning creditor—Legal and beneficial owners of a debt as petitioning creditors.

Where the legal and beneficial ownerships of a debt are in different persons, a petition for adjudication of the debtor as an insolvent can only be presented by both the owners, and not by either of them singly.

In re Adams, Ex parte Culley (9 Ch.D., 307) and *In re Hastings, Ex parte Dearle* (14 Q.B.D., 184) followed.

PETITION by James Hughes, a creditor, for the adjudication of Alfred Shaw, of Brisbane, as an insolvent.

On the evidence filed by the parties it appeared that the petitioning creditor's debt was a judgment debt for £506, being part of a sum of £1,012 due by respondent and another on a guarantee given by them to Henry Hughes, of whose will the petitioner was the executor. It appeared that the respondent had failed to point out property to satisfy this judgment, but that before the presentation of the petition the petitioner had assigned all his beneficial interest in the debt to a third person, Mr. W. H. Sprigg. All the material facts appear fully in the judgment of the learned judge.

Macgregor for petitioning creditor.

Lukin for respondent.

REAL, J.: In this case the petitioning creditor had under an agreement a possible claim against the respondent. That claim he assigned to a man named Mr. Sprigg. The evidence shows

same nature in both cases. And I think that, if possible, some effect is to be given to the words "property and interest" as indicating something not the same as that which would have been denoted by the words "moneys payable," &c., standing alone, although no doubt for some purposes, and in some contexts, the two expressions might be synonymous. Now the property and interest of the insured himself includes both the formal or legal right to enforce the contract contained in the policy, and also the beneficial interest in the policy moneys when received. The title of the personal representatives of a deceased person, whether he is intestate or not, is derived from the grant of administration or probate. By virtue of that grant the personal estate is vested in them, upon trust for the next of kin or legatees, subject to a charge of the debts of the deceased. His property and interest is different from that of the beneficial owners, and is limited to the right of legal dominion or control. This right is exactly analagous to the legal estate of a trustee to whom land is devised in trust. In either case the property in question is charged by law with the debts of the deceased, and the legal estate formally vested in the trustee may be taken for the purpose of paying them. I think that the term "property and interest" expresses this legal estate as distinguished from the whole legal and equitable interest in the policy moneys, and that the effect of the enactment is therefore merely to extinguish the charge of debts to which that legal estate was subject, so leaving the whole benefit of the estate to the legatees or next of kin. There can be no doubt that this is the effect of the enactment in the case of intestacy. I see no sufficient reason for a different conclusion in the case of a will. This conclusion is confirmed by a consideration of the operative words by which the protection is afforded, and to which I shall have to call special attention in dealing with the second of the two possible constructions already mentioned, which I proceed to do. Adopting that construction, the enactment will read "nor

shall the moneys payable under the policy be liable to be made available," &c. Upon this it may be observed that the word "liable" imports the idea of a risk to which the thing spoken of is exposed, and which may befall it, at the option of some power over which the person interested has no control. If, then, the Legislature desired to enact that a testator should not be able by his will to direct that policy moneys, his own property, should be applied in payment of his debts, they have certainly chosen a singular form of words to express that idea. For, according to the argument, the property which is forbidden to be applied in payment of debts is the policy moneys, and the forbidden mode is the testator's will. The enactment then is to be read, "The moneys payable under a testator's life policy shall not be liable to be made available by his will for the payment of his debts." That is to say, the testator's property shall not be exposed to the risk of the testator's volition. So much for the word "liable." The words "made available" raise almost equal difficulties in the way of Mr. Rutledge's contention. For all a testator's property was already by law available for the payment of his debts. To speak, therefore, of a testator's will as a means by which it is made so available, would be, to say the least, a very inaccurate form of expression. If language were found in a statute that was only susceptible of one construction so as to give the enactment any effect, it would be the duty of the court to construe it accordingly, however inaccurate or inapt the language might appear; but I think that such an apparent inaccuracy or inaptness should lead the court to consider whether there is not some other construction that would give effect to the will of the Legislature. If, therefore, the grammatical construction now under consideration is to be adopted, I think the use of the words "liable" and "made available" must be taken of themselves to indicate that the protection is against some risk that might arise from some person other than the testator himself, and against some act that would have the effect of producing a

result which would not otherwise occur. There is nothing in the Act which directly suggests an intention to interfere with freedom of testamentary disposition. The provisions of s. 6, already mentioned, which protects assignments of policies made for valuable consideration, were referred to in argument as indicating that, but for these provisions, s. 2 would have had the effect of invalidating such assignments, and that as they had been especially protected, while testamentary dispositions in favour of creditors were not mentioned, the latter were invalidated. I do not think, however, that this would be a legitimate inference to draw, even if s. 6 were not otherwise necessary. But that section might well be introduced, not only for the purpose of removing doubts and of showing that the intention of the Legislature was not to interfere with the freedom of disposition of the insured himself, but also to protect the rights of an equitable assignee, or assignee of a policy under a partial assignment, although the formal right to recover the policy moneys were vested in the personal representatives. So far, therefore, from finding in s. 2 an explicit and unambiguous expression of intention to interfere with freedom of testamentary disposition, I am of opinion that the Act does not in any way affect or deal with the power of disposition of the insured himself either in his lifetime or by will, but that the provisions of the second section have merely the effect of depriving creditors of that right of recourse which, under the general law, they would have against the policy during the life of the insured, and against the policy moneys as legal assets in the hand of his personal representatives. In the present case the meaning of the words of the will admits of no doubt. It is not necessary to consider whether a mere charge of debts would have a similar effect, but I am not to be understood as suggesting any doubt on that point. The result, in my judgment, is that the gift of the policy moneys as part of the testator's estate for the benefit of his creditors as a class is valid, and that they are entitled, as objects of his bounty, to have the trusts of the will in their

favour carried into execution. But it must be understood that they take as legatees, described by the term "creditors," and not under the general law which entitles creditors to recourse against the estate of a deceased debtor.

COOPER, J. : I concur.

REAL, J. : I also concur.

Solicitor for plaintiffs : *J. F. Fitzgerald.*

Solicitors for defendants : *F. G. Hamilton.*

IN CHAMBERS.

REAL, J.

8th and 9th January, 1896.

Re ALFRED SHAW, Ex parte HUGHES.

*Insolvency Act of 1874, s. 47—Creditor's petition—
Good petitioning creditor—Legal and beneficial
owners of a debt as petitioning creditors.*

Where the legal and beneficial ownerships of a debt are in different persons, a petition for adjudication of the debtor as an insolvent can only be presented by both the owners, and not by either of them singly.

In re Adams, Ex parte Culley (9 Ch.D., 307) and *In re Hastings, Ex parte Dearle* (14 Q.B.D., 184) followed.

PETITION by James Hughes, a creditor, for the adjudication of Alfred Shaw, of Brisbane, as an insolvent.

On the evidence filed by the parties it appeared that the petitioning creditor's debt was a judgment debt for £506, being part of a sum of £1,012 due by respondent and another on a guarantee given by them to Henry Hughes, of whose will the petitioner was the executor. It appeared that the respondent had failed to point out property to satisfy this judgment, but that before the presentation of the petition the petitioner had assigned all his beneficial interest in the debt to a third person, Mr. W. H. Sprigg. All the material facts appear fully in the judgment of the learned judge.

Macgregor for petitioning creditor.

Lukin for respondent.

REAL, J. : In this case the petitioning creditor had under an agreement a possible claim against the respondent. That claim he assigned to a man named Mr. Sprigg. The evidence shows

that the assignment was made before the presentation of this petition, and a copy of that instrument of assignment was put in and admitted. The evidence of Mr. Woolf, which was agreed by both parties—at all events by the petition—to be taken as correct, has also been given, and it corresponds, I may say, with the legal effect of the instrument. The view taken by the respondent is that the petitioner had parted with the whole of his beneficial interest in the debt in respect of which this judgment was obtained—the judgment which forms the debt upon which the present petition is founded. Mr. Woolf says, “Mr. Hughes has no beneficial interest in the £1,000. He is, I presume, a trustee. No notice of assignment has been given by him or by Mr. Sprigg.” That being so, the question arises whether this petition can be maintained. As said by Brett in *Ex parte Dearle, In re Hastings*, “In order to maintain a bankruptcy petition under the present Bankruptcy Act, there must be a petitioning creditor’s debt, an act of bankruptcy, and the proper petitioning creditor.” Here the debt is a judgment debt. To my mind it is equally clear, as far as the evidence is concerned, that there is an act of bankruptcy with reference to not pointing out sufficient disposable goods to satisfy the debt, and the question is whether there is a good petitioning creditor. That depends on the rules which governed bankruptcy proceedings before the Act of 1869. In all these matters it was held to be established law that it is necessary that the beneficial owner in a debt must join. By s. 6 of *The Bankruptcy Act of 1869*, and by s. 47 of our Act, “the debt of the petitioning creditor must be a liquidated sum due at law or in equity, and subsisting as well at the time when the act of insolvency was committed as at the time of presenting the petition.” Upon the construction of s. 47, which corresponds with s. 6 of the English Act, it was argued that the principles of the Bankruptcy Courts have been changed, and that a debt which was merely a legal debt, or a debt which was merely an equitable debt, would be sufficient to support a petition,

The decision in the case of *Ex parte Cully, In re Adams*, followed in the case of *Ex parte Dearle, In re Hastings*, show conclusively that the principles of the Court of Bankruptcy were not altered by s. 6, and that it is still necessary to apply the principle or rule as laid down in *Ex parte Cully* by Lord Justice James: “But there is nothing in the Judicature Act, or in s. 6 of the Bankruptcy Act, to alter the old rule of law or practice of the Bankruptcy Court, that for the safety of mankind the beneficial owner must join in the requisite oath that the money is justly and truly due; that it has not been paid; and that he has no security for it. It was considered not sufficient to have only the oath of a man to whom in fact not a farthing was due, and who might know nothing at all about the security which the real owner had got. In my opinion that old rule has not been altered, and therefore I think the Registrar’s order was quite right.” The reason for the rule is there laid down, and it is again repeated in the judgment of Brett, M.R., in *Ex parte Dearle*: “That was not a mere rule of practice; it was a rule of conduct founded on principle, for if you took no notice of the *cestui que* trust it might well happen there was no real debt at all, though in legal parlance there might be a debt. The *cestui qui* trust who was competent to do so might have released the debt. I think the reason remained after the passing of *The Bankruptcy Act of 1869*, and that it remained, after the passing of *The Bankruptcy Act of 1883*, just as it did before.” The ground for the decision in both those cases, and the reason of the rule, are stated to be that a person other than the petitioning creditor had power to receive payment or give a release from the debt. That seems to me to be the principle and, therefore, that seems to me to be the test which I have to apply in constructing whether there is in this petition a good petitioning creditor. That being the rule and the reason, it becomes necessary to examine this document. It seems to me that it is perfectly clear on the very face of the document itself that Mr. Sprigg has a right to receive the money, and to give a discharge for it,

I may say I was much impressed with the argument of Mr. Macgregor, that the trustee here had a duty to perform, and therefore could not be held to be a mere bare trustee, but if the meaning of bare trustee in any particular case is to be so constructed, or if the words "bare trustee" could be understood to have been so used as having that meaning in the cases cited, then those words are not necessary for the purposes of their decision. I have no doubt that, *prima facie*, "bare trustee" is a proper phrase to indicate that a person has no beneficial interest in the property in question at the time, although he has some active duties to perform in connection therewith. The reason for requiring the beneficial owner to be joined does not arise from any specific section. It arises from the practice of the Bankruptcy Court, which was called into existence for the reasons stated in the judgment of Lord Justice James, "That for the safety of mankind the beneficial owner must join in the requisite oath," &c. That oath would be an idle waste of time if it could be made by a person who had no beneficial interest whatever in it, and it would give rise — not perhaps in this case, but in many cases—to very great abuse, because if a man had satisfied a claim by paying the money to the person who was properly entitled to it, he might nevertheless have a bankruptcy petition presented against him if it were sworn to only by a person having no beneficial interest. I think all the reasons which gave rise to that rule continue in full force, and I am, therefore, of opinion that in all bankruptcy petitions it is necessary that the person who is beneficially interested must be joined.

Macgregor applied, under s. 169 of the Insolvency Act, for leave to amend the petition by adding *Sprigg* as a party.

Lukin objected.

REAL, J.: I am so doubtful as to my power to allow an amendment by way of adding a new party, that I think I would only be misleading the petitioner if I granted his application. I

cannot allow the amendment, and the petition will be dismissed, with costs.

Solicitors for petitioner: *Hart, Flower & Drury*.

Solicitor for respondent: *T. O'Sullivan*.

BRISBANE CRIMINAL SITTINGS.

GRIFFITH, C.J. 28th and 29th November, 1895.

REGINA v. FUZIL DEEN.

Criminal Law—Evidence—Murder—Husband and Wife.

A man and a woman at Sydney, N.S.W., went through a ceremony which they believed to be a marriage ceremony according to the Mahommedan faith, before a person whom they believed to be a Mahommedan priest, and they subsequently lived together as man and wife.

The woman was tendered as a witness against the man on a charge of murder.

Held, that the validity of the marriage must be determined by the judge as a question relating to the admissibility of evidence. The marriage being held to be invalid, the woman's evidence was admitted.

TRIAL of Fuzil Deen before Griffith, C.J., at the Brisbane Criminal Sittings, on the charge of murdering Koomal.

Power, for the Crown, tendered Gul Shang as a witness.

Macgregor, for the prisoner: I am instructed that this witness is the prisoner's wife. On that ground I object to her evidence.

Power disputed the fact of the marriage.

GRIFFITH, C.J.: The objection raises a question of fact which must be determined by the Court before admitting or rejecting the evidence.

Gul Shang, sworn on the *voir dire*, deposed that she was prisoner's wife, having been married to him in Sydney some five or six years previously. The marriage was performed by a Mahommedan priest, and the ceremony, which took place in the presence of several witnesses, was according to

the rights of the Mahommedan faith. The witness was a widow at the time of her marriage with the prisoner, and had subsequently lived with him as his wife in the belief that they were properly married.

Peter Macpherson (sworn on the *voir dire* and also in the case) deposed that he was a solicitor of the Supreme Court of New South Wales, and that, by the marriage laws of that colony, with which he was acquainted, a marriage, to be legal, must be solemnised by a minister of religion ordinarily officiating as such, and who is registered as a minister for celebrating marriages, or by a Registrar. He did not think a Mahommedan priest could be registered in New South Wales as a minister for celebrating marriages. There was no provision in the law of New South Wales for validating marriages made by unqualified persons who were believed by the contracting parties to be qualified.

GRIFFITH, C.J. : I am of opinion that the witness is not the prisoner's wife. She may therefore be sworn as a witness for the prosecution.

Gul Shang was sworn accordingly.

IN CHAMBERS.

REAL, J. 30th January, 1896.

Re GAYLARD, *Ex parte* PATERSON AND CO.

Insolvency Act of 1874 (38 Vic., No. 5), s. 202 (12)

R. 202—*Creditor's petition*—*Petition by debtor under secs. 202 and 204 as an act of insolvency.*

The filing by a debtor of a petition under secs. 202 and 204 of *The Insolvency Act of 1874* is an act of insolvency on which a creditor may present a petition for the adjudication of the debtor.

CREDITOR's petition presented by Paterson and Co. for the adjudication of John Gaylard as an insolvent,

John Gaylard presented a petition under secs. 202 and 204 of the Act for the liquidation of his affairs by arrangement. Paterson and Co., judgment creditors of the debtor, before the day fixed for the first meeting presented a petition for adjudication under s. 202 (12) and r. 202, alleging as the act of insolvency the filing of the liquidation petition by the debtor. Gaylard entered an appearance and disputed the act of insolvency.

Powers, for petitioning creditors submitted that the filing of the petition for liquidation was an act of insolvency, as it contained a declaration of the debtors inability to pay his debts. He cited *Ex parte Duignan*, (L.R. 6 Ch., 605.)

Lilley, for respondent submitted that it was not an act of insolvency within the meaning of s. 44.

REAL, J. : I think the filing of the liquidation petition by a debtor is an act of insolvency on which any of his creditors could found a petition for his adjudication. I therefore make the adjudication as prayed.

Solicitors for petitioning creditors: *J. Nicol Robinson & Co.*

Solicitors for debtor: *Bernays & Osborne.*

IN CHAMBERS.

COOPER, J. 10th February, 1896.

Re J. C. MARTIN.

Insolvency Act of 1874 (38 Vic., No. 5), s. 204, rr. 191, 216, Form 93—*Notice of second meeting*—*Notice of meeting in "Gazette."*

Resolutions confirmed at a second meeting under s. 204 may be registered, notwithstanding that no notice of that meeting was inserted in the *Gazette*, as required by r. 191.

APPLICATION to register resolutions passed at a second meeting of the creditors of J. C. Martin under s. 204 of *The Insolvency Act of 1874*.

In this case the resolutions had been presented for registration, and the Registrar had refused to register them on the ground that the *Gazette* notice required by r. 191 had not been inserted,

On a reference to the Judge in Chambers :

Green, for the applicant : Rule 191 is quite inconsistent with the provisions of r. 216, for the former rule requires seven days' notice of the meeting to be given in the *Gazette*, and the latter permits the notices for a second meeting to be sent out on the third day before the meeting. Under such circumstances a notice in the prescribed form (Form 98) could not be inserted in the *Gazette*. That being so, it is doubtful whether r. 191 applies to second meetings, and whether the advertisement is necessary.

COOPER, J. : I think the advertisement of the second meeting may be dispensed with, and the resolutions registered.

Solicitors for applicants : *Macdonald-Paterson & Hawthorn*.

IN CHAMBERS.

GRIFFITH, C.J.

4th March, 1896.

Re MOXHAM'S WILL.

Passing accounts—Executors carrying on a business—Subscriptions to local matters on behalf of the business—Commission to executors carrying on a business.

Executors carrying on a testator's business in a country town subscribed in the name of the business to local charities and sports.

Held, under the special circumstances, that the subscriptions might be allowed as proper expenses of the business.

Although executors carrying on a business under a will are not entitled to a commission on anything beyond their net receipts from the business, their trouble in carrying on the business was considered in fixing the rate of commission allowed on their whole receipts.

Re Walker's will, 6 Q.L.J., 259, followed.

APPLICATION by Taylor and B. Behr to pass their accounts as executors of the will of Moxham, deceased, for a commission on their receipts.

The accounts showed that Behr and Taylor had been carrying on the testator's business at Cler-

mont for some twelve months after his death, and had eventually sold it as a going concern for £300, and that, during that time, they had subscribed, in the name of the business, to local charities and sports at Clermont. They filed an affidavit stating that such subscriptions were necessary to maintain the popularity of the business. The Registrar disallowed these disbursements, which amounted in all to £6 14s. 6d.

The gross returns from the business were £737 16s. 11d., and the expenses about £700. The executors' receipts from other sources amounted to £2000.

Chambers, for the executors, asked that, before passing the accounts, the Registrar's certificate might be amended, by the allowance of the amount paid for subscriptions, as those payments were in the nature of advertisements, and might fairly be treated as business expenses. The trouble taken by the executors in connection with the business should be considered in fixing the amount of their commission.

GRIFFITH, C.J. : I think that the executors were, under the circumstances, justified in subscribing as they did to local matters. I therefore direct the certificate of the Registrar to be amended by the allowance of the items for subscriptions, and pass the accounts as certified by the certificate as so amended. As regards the commission to the executors, I am of opinion that, although, under the rule in *re Walker's Will* (6 Q.L.J., 259), I can only allow them commission on the net proceeds of the business, still I can take their trouble in carrying on the business into consideration when fixing the rate at which commission is to be allowed them, not only on the net profits of the business, but also on their receipts from other sources. I allow commission at 2½ per cent. on £2000.

Solicitors for executors : *Chambers, Bruce & McNab*.

IN CHAMBERS.

COOPER, J. 16th March, 1896.

Re WEBB'S BILL OF SALE.

Bill of sale—Renewal of registration—Re-registration of a bill of sale—Bills of Sale Act of 1891 (55 Vic., No. 23), s. 17.

The mortgagee under a bill of sale having failed to renew the registration of his security within the prescribed time, presented a sworn copy of the bill of sale, and sought registration of it as an original document.

Held, that the bill of sale could not be twice registered as an original, and that registration must be refused.

APPLICATION by F. I. Power to register a bill of sale dated 2nd March, 1893, and given by A. E. Webb to himself.

The applicant presented the original bill of sale, and a sworn copy thereof, and asked for registration. On an examination of the bill of sale, it appeared that it had been previously registered in 1893, and that that registration had been renewed in 1894 and 1895, but that the date for renewal in 1896 had been allowed to pass. The Registrar refused to register the bill of sale a second time.

On a reference to the Judge in Chambers :

Chambers, for the applicant, submitted that the mortgagee was, under the Act, entitled to obtain a re-registration of his security, instead of renewing the original registration.

The *Registrar* submitted that the renewal not having been effected within the prescribed time, the original bill of sale had become inoperative, and could only be re-instated by an order for renewal by a judge, under s. 17 of the Act. He had, therefore, refused to register the document, as he considered it was an attempt to evade the provisions of the Act.

COOPER, J.: I quite agree with the position taken by the Registrar. The mortgagee, if he wishes to revive his remedies under this document, must apply for leave to renew its registration, under s. 17 of the Act. He can, of course, if he prefers to do so, obtain the execution of a fresh bill of sale, which would be registered in the ordinary way.

Solicitors for applicant: *Chambers, Bruce, & McNab.*

GRIFFITH, C.J.

6th March, 1896.

Re WM. JONES, A LIQUIDATING DEBTOR.

Insolvency Act of 1874 (38 Vic., No. 5), ss. 101 (4), 136, 193, 194, 195, rr. 185, 186—Removal of a trustee in a liquidation by arrangement—The Insolvency, Intestacy, and Insanity Administration Act of 1893, ss. 5 and 7.

The court has jurisdiction to remove a trustee in a liquidation by arrangement upon sufficient cause shown.

The Official Trustee in Insolvency reported to the court that S., a trustee in a liquidation by arrangement of the affairs of a debtor, had failed to comply with the provisions of the Acts and Rules as regards the furnishing of his accounts as such trustee. The report also showed that the trustee had neglected to consult his committee of inspection in his dealings with the debtor's property; that he had retained a large sum of money in his hands for more than a month after he had been directed by the committee of inspection to pay it into a bank named by them; and afterwards, when the money was not forthcoming, said it had been stolen, but had subsequently paid into the bank named by the committee of inspection the greater part of the money. On the application of a creditor, who was also one of the committee of inspection, S. was removed from his office of trustee and ordered to pay the balance of the money to the Official Trustee without any deduction for his remuneration, and to pay the costs of the Official Trustee's report and of the creditor's application for removal.

Rules 185 and 186 of the Insolvency Rules apply to a trustee in a liquidation by arrangement.

Quære whether s. 101, subsec. 4, of the Act applies to such a trustee.

THE Official Trustee in Insolvency had made a report to the Court (Griffith, C.J., in Chambers), in the matter of the liquidation by arrangement of the affairs of William Jones. The learned judge adjourned the matter into court.

The Official Trustee read his report, which set out the facts as they appear above and in the judgment of the learned judge.

Macdonnell, for A. Muir, a creditor and member of the committee of inspection, moved that C. J. W. South, the trustee, might be removed from his office. In *Re Blocksidge* (6 Q.L.J., 143), Harding, J., made an order for the removal of a trustee in a liquidation.

Pezz, for the trustee: There is a preliminary objection to this application. A trustee under a liquidation cannot be removed by the court. The

creditors' remedy is under r. 241. S. 186 does not apply to a liquidation by arrangement (*Ex parte Brooker, Re Fastnedge*, 2 Ch.D., 57), nor does s. 101 (4). As the trustee has not furnished any accounts there has been no failure by him to comply with the requirements of r. 194. Neither the Official Trustee nor the creditor has any *locus standi*, and the application should be dismissed as bad in form. He read an affidavit by the trustee in explanation of the facts reported to the court.

Macdonnell: Even if s. 101 (4) does not apply to a trustee in a liquidation, ss. 193, 194 and 195 are specially made by the 1893 Act to apply to such a trustee, and therefore the rules under those sections—rr. 185, 186—apply also to liquidation proceedings. Under those rules the court has power to remove the trustee or make such order as it shall think proper. (He cited *Ex parte Old, In re Bright*, L.R. 17 Eq., 457.)

GRIFFITH, C.J.: Before the Act of 1893, the provisions of the insolvency law with respect to the supervision of the trustees of liquidating debtors were incomplete and unsatisfactory. *The Insolvency Act of 1874* provided for the appointment of an officer called the Accountant in Insolvency, whose duty it was to supervise the conduct of trustees in insolvency; and one of his duties was, if a trustee did not faithfully perform any duty, to inquire into the matter, and, if not satisfied, to report the matter to the court, and the court could then deal with the trustee. The Act of 1893 relieved the Official Trustee from the supervision of the Accountant in Insolvency, and required him to discharge the duties of accountant as to elected trustees. It also provided that his supervision of trustees should extend to the trustees of liquidating debtors, and the sections of the Act which imposed these duties on the Accountant (ss. 193, 194 and 195) were expressly made applicable to the cases of liquidating debtors and the trustees of such debtors. I think it follows that rr. 185 and 186, which provide for the exercise of that duty, were equally made applicable. I think, therefore, that I must deal with the matter precisely on the same footing

as if the proceedings were in insolvency, instead of in liquidation. I confess that I feel some doubt whether s. 101, subsec. 4, which expressly gives the court power to remove trustees, applies to the case of a liquidation. I am not sure that it does, and I am by no means sure that it does not; but I think, as I have said, that the effect of the Act of 1893 is to make the provisions of the Act and Rules relating to the supervision of trustees, applicable as well to trustees in liquidation as to trustees in insolvency. Now, amongst other provisions, trustees are bound to furnish accounts to the Accountant within fourteen days after the end of the year, and if a trustee fails to make such a return he may be removed from his office at the instance of a creditor or of the Accountant. Rule 186 provides that "the Accountant shall take cognizance of the conduct of trustees, and in the event of any trustee not faithfully performing his duties, and duly observing all the requirements imposed on him by statute rules or otherwise, relative to the performance of his duties, or in the event of any complaint being made to the creditor in regard thereto, he shall inquire into the same, and if not satisfied with the explanation given he shall report thereon to the Court, which, after hearing the trustee, may remove him from his office or otherwise make such order in the matter as the justice of the case may require." I think, therefore, that I have jurisdiction to make an order for the removal of a trustee in a proper case. Mr. Macdonnell appears for a creditor and a member of the committee of inspection, and asks that the trustee may be removed from his office. Being of opinion that I have power to make such an order, the question is whether I ought to do so. In the present case it appears that the trustee received about the beginning of September last a considerable sum of money in cash, and subsequently received other sums, amounting altogether to over £144, which up to 3rd January he kept, although the committee of inspection directed him to pay it into a bank. The trustee says he put the money into his safe, and that it must have been stolen. That is the only explanation he

gives. There is a discrepancy in the figures which I do not understand. A sum of money said to have been received on 2nd September in cash is now said to have been made up in part of a cheque drawn on the 16th November, which is absurd. However that may be, Mr. South had in his possession over £144, which he ought to have paid into a bank not later than the day on which the creditors required him to pay it into the Bank of Australasia. Their resolution to that effect was passed on 22nd November, but no money was paid into the bank till the 8th January, after the matter had been reported to the court. On 3rd January the trustee said for the first time that the money must have been stolen. Without going into further details, I think that the conduct of the trustee has been extremely unsatisfactory, and that this is a case in which he ought to be removed. As to Mr. Macdonnell's client, I think that on a motion of this kind a creditor is entitled to be heard. If several creditors unnecessarily came into court, they would not get their costs. But I think it is more satisfactory to the court that it should be moved to act in the interest of creditors than act of its own motion. It is not ordinarily the duty of the Official Trustee to be an active litigant in his capacity as Accountant. I think therefore that Mr. Macdonnell is properly here. The trustee has since paid into the bank £119 9s., a part, but not the whole, of the money, and says he has retained fifteen guineas, which he says was fixed by the creditors as the amount of his remuneration. But that remuneration was intended to be paid for the work of winding up the estate. He has not done the work, but he has received a considerable sum of money, which he has kept for a long time. I do not think the trustee has earned the fifteen guineas, and I do not think he is entitled to receive it. The order will be that Mr. South be removed from the position of trustee, and that he pay within two days, to the Official Trustee, the sum which he has retained. Mr. South must also pay the costs of the creditor, and the Official Trustee's costs out of pocket. I may add

that the intention of the Legislature, as I understand it, from the Act of 1898, was that all proceedings in liquidation as well as in insolvency should be subject to the strictest scrutiny of the court. I think, therefore, that the Official Trustee is merely doing his duty when he brings under the notice of the court, publicly, any matter which he considers irregular or improper. For that reason I refused to dispose of this matter in Chambers, and also because it was one of difficulty and importance.

MARCH SITTINGS OF THE FULL COURT.

—
GRIFFITH, C.J., COOPER AND REAL, JJ.
—

NO. 1 NORTH PHENIX GOLD MINING CO., LTD., v.

PHENIX GOLD MINING CO., LTD.

Mining appeal from District Court Judge and assessors—Appeal on question of costs—Judge's discretion—Order for costs part of judgment—Goldfields Act 1874 (38 Vic., No. 11), s. 74, Regulation 28—Gold Mines Drainage Act of 1891, s. 10 — Contribution for expenses of pumping.

An appeal does not lie from a decision of a District Court Judge as to the costs of an appeal from a Warden's Court:

Aliter if the judge did not, in fact, exercise any discretion as to the costs.

An erroneous application of a real or supposed rule of law adopted by a judge as a guide in the exercise of his discretion as to costs is not ground for appeal.

In deciding between parties to an action, a tribunal is not bound by a statement of facts agreed upon by one party and other persons not parties to the action.

Cross appeals, by way of special case, from a judgment of District Court Judge Miller (sitting at Gympie with assessors as a Court of Appeal from the Warden's Court) awarding to plaintiffs

£518 damages, with £242 12s. costs. The amount of costs was arrived at by allowing a fixed sum to plaintiffs and another sum to defendants, and setting off one sum against the other. Plaintiffs appealed from so much of the judgment as allowed defendants any costs. Defendants appealed from the judgment in so far as it did not allow them all their costs, and also from so much of the judgment as allowed plaintiffs more than £410 18s. 10d. damages, on the ground that there was no evidence to support a finding for a larger amount.

The facts appear fully in the judgment of the learned Chief Justice.

In the Warden's Court the plaintiffs had obtained judgment for £647. On the appeal the damages were assessed at £578, as above stated.

Byrnes, A.G., and *Woolcock* for plaintiffs: The plaintiffs' appeal is on the question of costs only. That appeal is an appeal from the decision of the judge on a point of law arising on the trial, for though at the hearing he reserved the question of costs for further argument, the order as to costs was undoubtedly part of the decree. The learned District Court Judge applied a rule of law in giving costs to each of the parties, and he applied it erroneously. He decided that a plaintiff who, on a rehearing, fails to obtain the full amount of damages awarded at the previous hearing, is to be treated as unsuccessful on the question of damages. An appeal will lie from the discretion of a judge on a question of costs where the judge has exercised his discretion on erroneous judicial principles.

GRIFFITH, C.J.: No. An appeal as to costs will lie to a Court of Appeal having general jurisdiction over a lower court, where that court has not exercised any discretion, or where it has erroneously considered itself bound by some rule of law.

Byrnes: The District Court Judge tried to apply the rule that the successful party should have their costs, and he failed to apply that rule correctly. The trial before him was a rehearing, and the plaintiffs were successful on all the issues, even if the issues were separable, which the

plaintiffs submit they were not. [They cited: *Myers v. Financial News* (5 T.L.R., 42), *Jones v. Williams* (L.R. 8 Q.B., 280), *The City of Manchester* (5 P.D., 221), *Gilbert v. Huddleston* (28 Ch.D., 549), *Young v. Thomas* (1892, 2 Ch., 184), *Field v. Great Northern Railway Company* (3 Ex.D., 261), *Green v. Wright* (2 C.P.D., 354), *Cooper v. Whittingham* (15 Ch.D., 501), *Jones v. Curling* (13 Q.B.D., 262, at p. 265), *Harris v. Petherick* (4 Q.B.D., 611), *Ann. Practice* (1896), p. 1134.]

REAL, J., referred to *Walter v. Steinkopff* (1892, 8 Ch., 489), and *Forster v. Farquhar* (1893, 1 Q.B., 564) as overruling *Cooper v. Whittingham*.

GRIFFITH, C.J., referred to *Dicks v. Yates* (18 Ch.D., 76).

Lilley and Stumm, for defendants: The court has no jurisdiction to hear an appeal on the question of the costs allowed by the learned District Court Judge. These costs were in his discretion, and from that discretion no appeal will lie.

REAL, J.: That destroys your own appeal on the question of costs.

Lilley: Certainly. Defendants are relying upon their appeal on the merits. The judge in allowing the costs did not follow the rule as urged by the learned counsel for the plaintiffs. Plaintiffs' counsel, on the hearing of the question of costs, asked him to apply that rule, and cited authorities to show him that under that rule plaintiffs were the successful parties, but he did not follow the suggestion. Plaintiffs' appeal should be dismissed. As to the appeal, on the merits the defendants claim that the measure of the damages which should have been found against them was not more than one-seventh of the whole expense of pumping. The 10th section of the Drainage Act, which must be taken as superseding Regulation 28 under the Goldfields Act, only gave the plaintiffs a right to contribution to the actual expenses, and the only evidence as to the proper amount of contribution is that of plaintiffs' manager, who said that each of the six mines adjoining plaintiffs' ground contributed about the same amount of water. The plaintiffs had agreed

with other adjoining mines that that was the true proportion.

GRIFFITH, C.J.: But the assessors had a view, and had also local knowledge.

Lilley: They could learn nothing from the view. It is simply a matter of calculation, as they knew what plaintiffs' expenses were, and the defendants' liability was one-seventh of that amount. And it was the duty of the District Court Judge, as a matter of law, to have directed the assessors to that effect. [They cited *Carr v. Stringer* (E.B. & E., 123), *Clifton v. Furlley* (31 L.J., Ex. 170), *Goodes v. Cluff* (13 Q.B.D., 694), *Plumb v. Craker* (16 Q.B.D., 40), *Harpham v. Shacklock* (19 Ch.D., 207).]

GRIFFITH, C.J., referred to *R. v. Justices of London* (1895, 1 Q.B., 616).

GRIFFITH, C.J.: The plaintiffs, who are the owners of a gold mine at Gympie, brought an action in the Warden's Court against the defendants for contribution towards the working expenses of raising water from their mine, on the ground that the defendants, as the owners of an adjoining mine, derived benefit from their operations; and in the alternative, that the plaintiffs' work of raising water was rendered more onerous by reason of the influx of water from the defendants' mine. The result of the trial in the Warden's Court was that the defendants were held to be bound to contribute to the plaintiffs' expense in raising the water; and the amount of the contribution was fixed at £647 10s. The defendants then appealed to the District Court under s. 71 of *The Goldfields Act of 1874*. The appeal was duly heard by a District Court Judge and assessors. The result was that the damages awarded were £518, instead of £647 10s.; that is to say, that the plaintiffs recovered a less amount of contribution than that to which the Warden's Court had held that they were entitled. Both parties now appeal to this court under s. 74 of the Goldfields Act, which provides that an appeal on all questions of law raised at the time of the hearing shall lie to the Supreme Court. The grounds of appeal are two, one relating to the question of costs. Section 75 of

the Goldfields Act provides that the District Court, as a Court of Appeal from the Warden's Court, may make such order as to the costs of the appeal as the court may think fit; and the 86th section provides that the judge shall fix the amount to be paid by one party to the other, and that in default of any special direction each party shall pay his own costs. The learned District Court Judge awarded costs to the plaintiffs to the amount of £334 19s. 10d., and he awarded costs to the defendants to the amount of £92 7s., directing the one amount to be set off against the other. He then entered judgment for the plaintiffs for £518, and £242 12s. for costs, being the difference between their costs and those allowed to the defendants. The plaintiffs object to that order so far as it relates to costs. They maintain that the plaintiffs were entitled to the whole of the costs of the proceedings, and that the judge was wrong in limiting the responsibility for costs to the costs of the issues on which he considered that they had succeeded. On the other hand, the defendants contend that they were entitled to the whole of the costs of the appeal to the District Court. These questions are entirely questions of costs. I have already pointed out that under s. 75 the District Court may make such order with respect to costs as it thinks fit. That means, I think, that the costs of appeal to the District Court are in the discretion of the judge of that court. I confess I have some difficulty in seeing what question of law was raised at the time of the hearing with respect to these costs. The order as to costs was undoubtedly part of the judgment of the court, but as it appears to me at present the only questions of law that can arise under this Act with respect to costs are these:—First, had the judge power to award costs to the party to whom he has awarded them? That is a question of law. If he has no power and he awards costs his order can be set aside by prohibition. The other question, and the only other one, as far as I can see, is this—Is the judge bound to award costs to either party? If he is, and does not award them, then he can be set right by a motion

in the nature of a *mandamus*. Beyond those two questions it is difficult to see what question of law can arise. The learned judge, in whose discretion the matter was, was of opinion that the plaintiffs had substantially succeeded, and he awarded them a certain amount of costs. He appears, also, to have been of opinion that the defendants were successful to a certain extent, in the sense that the burden cast upon them was reduced from £647 10s. to £518; and he thought, apparently, that it would be a fair rule to apply to say that each party should have their costs, so far as they had succeeded. He was not bound to apply any particular rule that I know of, in awarding costs. The learned judge seems to have thought that that was a fair rule to apply, and to have endeavoured to apply it. The substantial contention of the plaintiffs is that although he may have intended to apply that rule, he really did not do so; and that, if he had applied that rule, he would have awarded to the plaintiffs more costs, and would not have given the defendants any costs, because, although the amount of the damages was reduced, the defendants were not successful parties. They were certainly successful in the sense that by their appeal they reduced the burden cast upon them by the judgment of the court below, and it is in that sense that the learned judge seems to have treated the matter. He says in the special case that he allowed the respondents (the plaintiffs) the costs of the issues that the assessors had found in their favour, and the defendants the costs of the questions found in their favour, upon the reduction of damages. The difficulty I have felt is this—how is this anything but an appeal from the discretion of the judge? The general rule is that, where costs are in the discretion of a judge, there is no appeal from his decision as to costs, but if he, instead of exercising a discretion, applies some rule of law, or what he conceives to be a rule of law binding him, then there is an appeal from him, and if the Court of Appeal has general jurisdiction in the case, it can do what the judge below ought to have done. If a judge of the Supreme Court, in whose discretion the costs of a proceeding are, made

an order as to costs, saying that he believes he is bound by some rule of law to give the costs in a particular way, and makes his order in that way, an appeal will lie to the Full Court, which will make the order that he should have made. But it is a very different thing when a judge, in whose discretion costs are, says in effect, "In the exercise of my discretion I shall apply what I consider a rule of fair-play, which I think can be fairly applied in this case." If he misconceives or misapplies that rule, nevertheless he exercises his discretion. It seems to me to be one thing to say that a judge has misunderstood a rule, which he considered a rule of fair-play, and quite a different thing to say that he has not exercised his discretion. It seems to me that the most that can be said for the plaintiffs is that the learned judge did not correctly understand the rule that he intended to apply. But that is a very different thing from deciding contrary to some rule of law. It is clear that the learned judge had power to give costs to either party. He might have given no costs to either party, or he might have allowed them to either party in whole or in part. He might have ordered either party to pay costs, or to receive costs; and the principles that guide him in the exercise of his discretion cannot be examined by us. In the case of *Dicks v. Yates*, Lord Justice James pointed out the great distinction between plaintiffs' costs and defendants' costs, which is that a party who is wrongfully brought into a court of justice, and is entirely successful, cannot be compelled to pay the costs of the other side. That is not a matter of discretion. A man who is innocent and who is successful cannot be made subject to costs. But in respect to a plaintiff who is successful, the court may, in the exercise of its discretion, order him to pay the whole or any part of the costs. It appears to me that in this case the judge had power to award costs to either party. He exercised his power, and we have no power to review his decision, unless there is a point of law involved. I think, therefore, that both the appeals on the question of costs fail. Another point was made by

the defendants, and arose in this way: The plaintiffs are only entitled to receive from the defendants a contribution towards their actual working expenses in raising the water. The amount of that contribution is to be in proportion to the amount of benefit conferred upon the defendants, or the amount of the burden imposed upon the plaintiffs. It appeared at the trial that the plaintiffs' mine receives the water from seven mines, including their own, the defendants' being one of them. It appeared also that some time ago a proposal was made by the plaintiffs that the expenses of raising the water should be divided in sevenths, each of these mines paying one-seventh. The defendants and the owners of another mine did not agree to this proposal. The plaintiffs and four others did agree. Evidence was given at the trial, by the plaintiffs' manager, that the amount of the influx of water from the other six mines was about equal. The assessors, who performed the functions of a jury, apparently thought that it was not equal, because they say the defendants' contribution is somewhat more than one-seventh. I do not know any principle that can be laid down, or any reason that can be urged, binding them to accept the division of the burden claimed by the defendants if they did not think the facts warranted it. The agreement between the plaintiffs and four other persons did not bind the defendants, and they could not rely upon it as an estoppel. It seems to me that the matter was entirely at large for the assessors. They had a view of the mine; they lived in the neighbourhood, and knew the size and nature of the mines, the number of the reefs, and so on. These were all matters of common knowledge on the goldfield. They were not, at all events, bound to accept the estimate of the plaintiffs' manager. It seems to me that the matter was entirely at large for the assessors, and that it is impossible to say that the learned judge was bound to direct the assessors as a matter of law that the contribution of the defendants should be one-seventh. It seems to me that the appeal on that ground fails also, and that both appeals should be dismissed, with costs.

COOPER, J.: I am of the same opinion.

REAL, J.: I am of the same opinion, and I wish to add nothing as to damages. As to costs, it appears to me that it may have been, as contended by counsel, that the judge gave these costs under the idea that, technically, the questions relating to damages were answered in favour of the defendants. The question as put was, I think, technically speaking, answered in favour of the plaintiffs; but in substance defendants, by reducing the amount of damages, which was one of the matters on which appeal was made, may be said to have succeeded; and that partial success is the reason, and its nature appears to have been present to the mind of the judge as a reason, why he should give some costs to defendants. He says that he gave the defendants costs on the questions answered in their favour on the reduction of the damages, which shows that his mind was directed to the fact that by the answers to these questions the damages were reduced. I think it is clear, without referring to the decisions on the point, that under such circumstances a judge has power to give some costs against a plaintiff. That he has the power to give the whole of the costs against a plaintiff when the plaintiff is technically and substantially entirely successful, is a proposition I am not prepared to assent to until the Privy Council, or the Full Court of Queensland, so decide, or until it is clearly laid down by statute. It seems to me contrary to reason and common sense that such should be the case. The appeal section of the Goldfields Act enables persons who appeal to limit their appeal to any one issue, or to let it extend to all the issues. The defendants in this case, could have limited the appeal to the issue quantum of damage only. If it were limited to that one question, it seems to me perfectly clear that the defendants would have been partially successful. And to give the defendants some of the costs occasioned by the appeal, such costs as were in the opinion of the judge properly applicable to the reduction of damage, might be the only course which would deal justice to the

parties. Take for instance the case of a man injured in an accident, who sets up that amongst other injuries he is liable to lose his sight. Doctors and experts are called in and give evidence, and the jury find that he is not liable to lose his sight at all, and therefore they only give him £500 instead of £1000. Would it not be the height of absurdity to say that in that case the judge has not discretion to give the defendants part of the costs of that trial? It is the same here. In this case £647 40s. was obtained on the first trial. The evidence has been gone over again; it may be fresh evidence was given; it may be that counsel conducting the appeal case conducted it in a different manner; and the effect of that appeal was to reduce the amount to £518—practically by a fifth. The judge, under these circumstances, says that he considers the respondents are entitled to the whole of the costs of the action; and then he says that in his opinion the defendants have succeeded as regards the reduction of damages, and that being so gives to them the costs they incurred in conducting that part of the case which had the effect of reducing those damages. I think he had power so to do, and therefore I agree with my brother judges that this appeal should be dismissed, with costs.

Solicitors for plaintiffs: *Chambers, Bruce & McNab.*

Solicitors for defendants: *Tozer, Conwell & Tozer.*

MARCH SITTINGS OF THE FULL COURT.

GRIFFITH, C.J., COOPER AND REAL, JJ.

CASTLES V. ROESSLER.

*Contempt of court—Comment on action sub judice—
Appeal from trustees in an insolvent estate to
creditors.*

Plaintiff, who was the trustee in an insolvent estate, brought an action against defendant to set aside a bill of sale given by the insolvent, of which defendant was the assignee. While the action was pending, defendant

issued to the creditors in the insolvent estate a printed circular, giving his version of his dealings with the insolvent, and of the circumstances under which he became assignee of the bill of sale, and asking them to sign a document declaring that they disapproved of the action, and to cause all further proceedings in it to be stopped.

Held, that defendant was not, by his action in sending the circular, guilty of a contempt of court, and that the circumstance that the creditors might also be witnesses made no difference.

Motion to make absolute an order *nisi* calling on John Roessler to show cause why he should not be committed for contempt of court.

The plaintiff, William Castles, as the trustee of the insolvent estate of Gustavus Hirsch, brought this action against the defendant to set aside a bill of sale given by Hirsch to B. K. & Co., of which bill of sale defendant was the assignee. The defendant resisted the claim, and pending the action, issued to the creditors in Hirsch's estate a printed circular, setting out his version of his dealings with Hirsch, and of the circumstances under which he became assignee of the bill of sale, and asking them to sign a document, enclosed with the circular, expressing their disapproval of the trustee's course of action, and to stop all further proceedings. It appeared on the affidavits filed by the plaintiffs, that all the creditors to whom the circular was sent were intended to be called as witnesses in the action. The plaintiff obtained from Cooper, J. an order *nisi*, calling on the defendant to show cause why he should not be committed for contempt.

Lilley, for plaintiff: The circular, which is published while the case is *sub judice*, is addressed to persons who hold the dual position of creditors in the insolvent estate and witnesses in the action. On the authority of *Coats v. Chadwick* (1894, 1 Ch., 347), any attempt pending a cause to influence a witness, or even a party in the cause, is a contempt of court. The defendant has no *locus standi* in the insolvency, as he has not proved in the estate, and his attempt to influence the creditors was quite unwarranted.

The defendant, *in person*, was not called upon.

GRIFFITH, C.J.: This is an application to commit the defendant for contempt of court for issuing a circular commenting on the action. The plaintiff is the trustee of the insolvent estate of one Hirsch, and the defendant is the assignee of a bill of sale given by Hirsch before his insolvency. The action is brought to set aside that bill of sale. The defendant defends the action, and alleges in his defence the existence of two other bills of sale in his favour. He has issued a circular, which is the circular complained of, to the other creditors in the estate, requesting them to sign a document declaring their disapproval of the action, and asking them to stop any further proceedings. If this were a question of defamation, the circular would be called a privileged communication. The term "privilege" is generally used with special reference to cases of defamation, but I think that the underlying principle is a general principle of common sense,—that if a man has an interest in having the truth told to some one else, he is entitled to tell him the truth himself, and will not be blamed if he does so. I think, applying this principle, that the defendant, if he considered that he was being unjustly harassed by the trustee, was justified in telling the creditors that he considered the trustee was harassing him, and in asking them to prevent the harassment being continued; and that is all the defendant has done. Considering that the trustee was unjustly harassing him, he appealed to the creditors, as the persons really interested, to prevent the continuance of the injustice. I cannot see in that any contempt of court or violation of any duty. As the rule is asked with costs it must be discharged with costs.

COOPER, J.: I am of the same opinion.

REEL, J.: I also am of the same opinion.

Solicitors for plaintiff: *Riithning & Jensen.*

MARCH SITTINGS OF THE FULL COURT.

GRIFFITH, C.J., COOPER AND REEL, JJ.

REGINA v. WHITEHOUSE.

Criminal law—Embezzlement—Proof of incorporation of company—Crown case reserved.

On the trial of W. for embezzling moneys, the property of The New York Life Insurance Coy., evidence was given that a company carried on business in Brisbane under that name. No other evidence was given of the incorporation of the company in Queensland or elsewhere, nor was the name of any member of the company proved. W. was found guilty.

Held, on a Crown case reserved, that there was no evidence of the existence of the company as a corporation as distinguished from a partnership, and that, as no evidence had been given of the name of any partner, the conviction must be quashed.

Crown case reserved by District Court Judge Miller.

On the case stated by the learned District Court Judge, it appeared that the prisoner was charged before him at Rockhampton with the embezzlement of £10 10s., the property of the New York Life Insurance Coy. No evidence was given at the trial of the incorporation of the company in Queensland or elsewhere, but it was proved that a company was carrying on business in Brisbane under that name. The learned judge allowed the case to go to the jury, but reserved, (among other points which were not decided by the court), the question whether there was any proof of the existence of the company as an institution. The jury found the prisoner guilty.

The prisoner, *in person*, submitted that there was no proof of the existence of the company as a corporation as distinguished from a partnership, and that, as there was no proof of the name of any partner, the conviction should be quashed.

Byrnes, A. G., and Blair for the Crown. The fact that the company was carrying on business under the name stated, and the nature of that business, is some proof that it was not merely a partnership. They cited *R. v. Langton* (2 Q.B.D., 296).

REAL, J., referred to *R. v. Connell* (6 Q.L.J., 209).

GRIFFITH, C.J.: The first question reserved in this case is whether there was any proof of the existence of the New York Life Insurance Company as an institution, and that the prisoner was employed by that institution. I understand that to mean any proof of its existence as a corporation as distinguished from a partnership. The prisoner was charged before the District Court with embezzling the money of the New York Life Insurance Company, and the only evidence of its corporate existence was that a company, calling itself the New York Life Insurance Company, carried on business in Brisbane under that name. There was nothing else to show, and no other evidence to indicate, that it was incorporated by the law of Queensland, or by the law of any other country. We know that in these days there is a very large number of limited companies carrying on business in Australia, some incorporated by the law of Queensland, and some incorporated by the law of other countries. In the case of a limited company carrying on business in Queensland, the use of the word "limited" as part of its name, would, I think, in accordance with the case of *R. v. Langton*, be some evidence that the company is incorporated. In the case of other companies, a statement by a witness that a company was formed, say, in New York or New South Wales, or anywhere else, and was carrying on business by that name, would be some evidence that it was a foreign corporation, and entitled to recognition by the laws of international comity. But in the case of an institution as to which there is nothing to show how or where it originated, the mere fact that it is called a company does not indicate with any certainty that it is anything more than a partnership. We know that there are many partnerships, in Queensland and elsewhere, calling themselves companies, which are not incorporated. And, in the absence of any further evidence, either in the name of an institution or otherwise, than the use of the word "company," I do not think it is a legitimate inference that it is incorporated. On the evidence in this case it is equally probable

that the company in question is not a corporation but merely a partnership. In the case of a partnership, it is necessary that the name of one of the partners at least should be stated in the indictment as an owner, on a charge of embezzlement of property belonging to the partnership. That objection seems to be fatal, and without expressing any opinion on the other points, I think that the conviction should be quashed.

COOPER, J.: I am of the same opinion.

REAL, J.: I also am of the same opinion.

The conviction was quashed, and the prisoner discharged.

MARCH SITTINGS OF THE FULL COURT.

GRIFFITH, C.J., COOPER AND REAL, JJ.

Re J. R. NEWMAN-WILSON, A PERSON OF UNSOUND MIND.

Insanity Act of 1884 (48 Vic., No. 8, s.

—Curator's judicial capacity—Professional costs out of estates of insane persons.

The Curator in Insanity will not be allowed out of the estate of an insane person the costs of professional assistance in preparing a report under the *The Insanity Act of 1884*.

The lunatic was a partner in a firm of solicitors. The partnership was dissolved by the court, and it was referred to the Curator to take the accounts of the partnership. He employed, with the approbation of the other partners, a professional accountant to prepare a statement of the accounts of the partnership, and also employed a solicitor to assist him in preparing his certificate.

Half the accountant's charges were allowed, but the costs of professional assistance were disallowed.

REPORT by Curator in Insanity that he had expended £26 5s. in procuring a report from an accountant, and incurred other expenses for professional advice, in the estate of J. R. Newman-Wilson, a person of unsound mind, and application that he might be allowed those expenses out of the estate of the insane person.

Referred to the Full Court by Griffith, C.J.

The facts appear fully in the judgment of the learned Chief Justice.

Byrnes, A.G., and Bannatyne for the Curator, submitted that these expenses should be borne by the estate of the insane person, and not come out of the Consolidated Revenue.

GRIFFITH, C.J.: This matter arises out of a report made by the Curator in Insanity in the estate of James Rowe Newman-Wilson. He reported to me in Chambers that he had expended £26 5s. in procuring the report of an accountant as to the partnership affairs of the lunatic and his former partners, and that he had incurred other expenses for legal costs—that is, professional costs of a solicitor to advise him on various matters. He applied that those amounts might be allowed out of the estate of the lunatic. I referred the application to the Full Court, entertaining considerable doubts whether these expenses were properly incurred in the care, protection, or management of the estate within the 91st section of the Insanity Act. The question as to the first item arose in this way: After the order finding Mr. Wilson insane was made, an order was made for the dissolution of the partnership between Mr. Wilson and his late partners. By that order it was referred to the Curator as an officer of the court to take the necessary accounts and inquiries, and the order directed that this inquiry should not be proceeded with until a committee was appointed. Subsequently, a committee was appointed, and considerable progress was made in investigating the accounts. Then the committee died, and another was appointed afterwards. During the interval, the Curator, who was in point of law the committee also during that interval,

made an arrangement with the former partners of the lunatic to employ an accountant to investigate the partnership affairs, and bring up a report which might assist him in coming to a conclusion in the matter. It appears to me that under those circumstances the accountant was employed jointly, and for the joint benefit of the lunatic and of the other partners. I cannot see that it would be fair to impose upon the lunatic's estate the whole expenses of that report. Technically, perhaps, no part of them was properly incurred in the management of the estate, because the order directing the Curator to take the accounts, expressly directed that the accounts should not be taken until a committee was appointed. The Curator evidently did not think that, the committee having died, he was precluded from continuing his investigation during the vacancy of the office of committee, and perhaps the order was open to that construction. In this case, what the Curator has done was, under the circumstances, an extremely sensible thing to do. It saved a great deal of time, and, I think, expense. I do not think, however, that more than half the fee of the accountant can be said to have been properly incurred in respect to the care, management, and protection of the estate of the lunatic. Under all the circumstances, therefore, I think it can be said that that portion of the fee was properly incurred. With respect to the costs of the solicitor, they are costs which may be called the costs of employing a legal assessor; that is to say, the Curator having to transact, in the performance of his office, certain business requiring legal knowledge, and not possessing that legal knowledge himself, called in a solicitor to sit by him and advise him as he went along, and to draw up a report. I think, whether the Curator is a layman or a lawyer, the duties of his office require him to have, and if he has not, to get in any way he can, at his own expense, such legal knowledge as will enable him to discharge the duties of his office. He must not obtain the knowledge at the expense of the estate; of course he may obtain it at the expense of the Government. There is a Crown Law

Department, of which the Curator is an officer, and that office will of course give him such legal advice as he requires for the performance of his duties. I think that, under the circumstances, half the amount paid to the accountant—namely, £13 2s. 6d., may be allowed. The other amounts asked for cannot be properly allowed.

COOPER, J. : I am of the same opinion.

REAL, J. : I also concur. If ss. 91 and 158, which specially provide for the instances in which costs are to be allowed out of the estate, do not give the Curator the costs, I don't see how he can get them out of the estate. If the matter does not come under those sections, the Curator can do as the Chief Justice says—go to the Crown Law Office for his legal advice.



END OF VOLUME VI.



Standard Law Library



3 6105 062 517 946

